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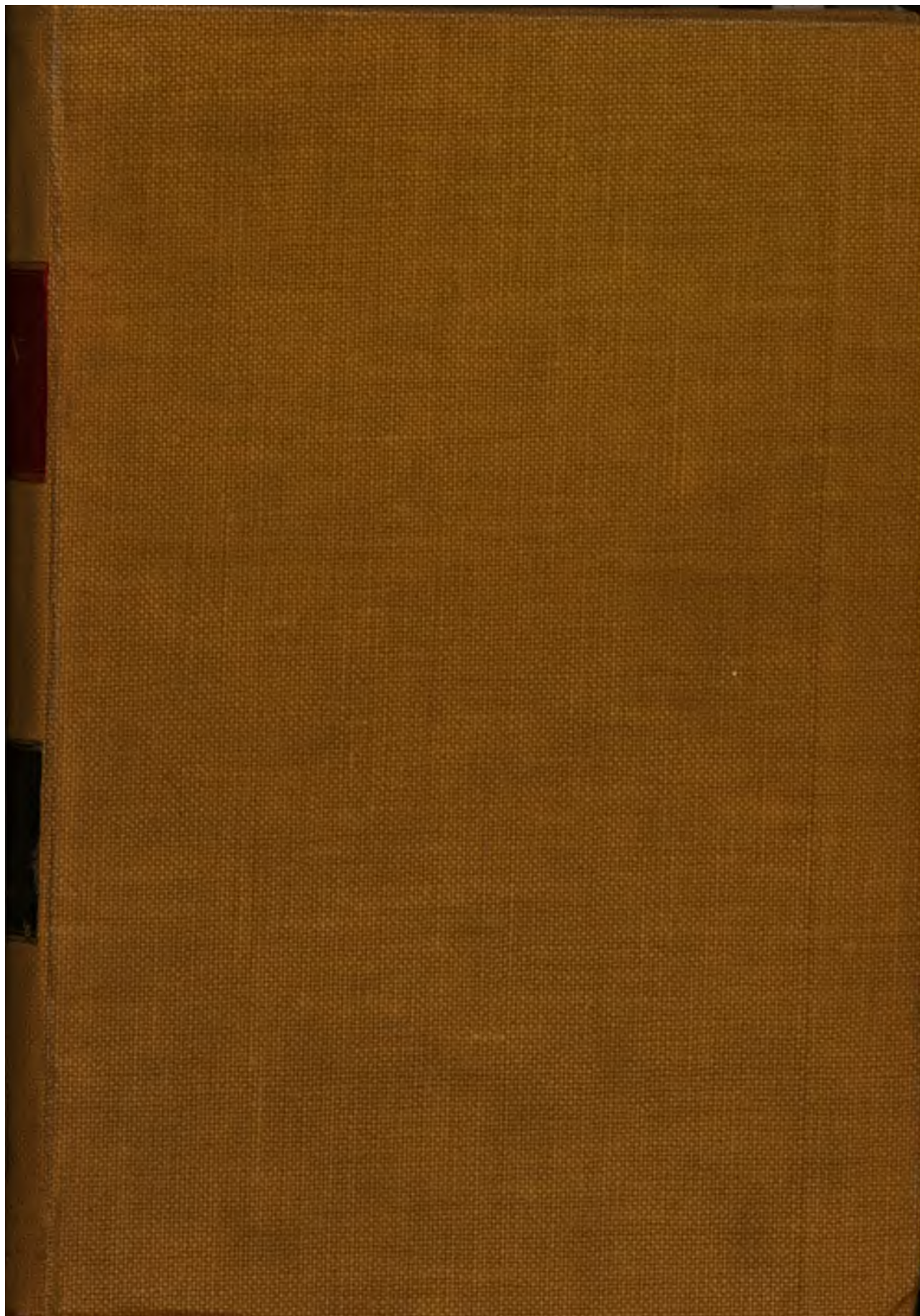
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CHARTER, ETC.

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PART XI.

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS. ATTORNEYS' FEES. ACCOUNTING AND SETTLEMENTS. PAYMENT OF DEBTS.

CHAPTER I.

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS. ATTORNEYS' FEES.

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- § 651. Compensation of representative and attorney. Appeal.
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LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINIS- TRATORS. ATTORNEYS' FEES.

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§ 647. Personal liability of representative. No executor or administrator is chargeable upon any special promise to answer in damages or to pay the debts of the testator or intestate out of his own estate, unless the agreement for that purpose, or some memorandum or note thereof, is in writing or signed by such executor or administrator, or by some other person by him thereunto specially authorized in writing. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 502), § 1612.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1847.
Colorado. 3 Mills's Ann. Stats., sec. 4815b.
Idaho. Code Civ. Proc. 1901, sec. 4235.
Montana. Code Civ. Proc., sec. 2770.
Nevada. Comp. Laws, sec. 2963.
North Dakota. Rev. Codes 1905, § 8177.
Oklahoma. Rev. Stats. 1903, sec. 1713.
South Dakota. Probate Code 1904, § 265.
Washington. Pierce's Code, § 2630.
Wyoming. Rev. Stats. 1899, sec. 4706.

§ 648. Executor to be charged with all estate, etc. Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession, at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit, and income of the estate. **Kerr's Cyc. Code Civ. Proc., § 1613.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 865, p. 323.
Arizona.* Rev. Stats. 1901, par. 1848.
Colorado. 3 Mills's Ann. Stats., sec. 4746.
Idaho.* Code Civ. Proc. 1901, sec. 4236.
Kansas. Gen. Stats. 1905, § 3028.
Montana.* Code Civ. Proc., sec. 2771.
Nevada. Comp. Laws, sec. 2964.
New Mexico. Laws 1901, sec. 30, p. 156.
North Dakota.* Rev. Codes 1905, § 8178.
Oklahoma.* Rev. Stats. 1903, sec. 1714.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1205.
South Dakota.* Probate Code 1904, § 266.
Utah.* Rev. Stats. 1898, sec. 3929.
Washington.* Pierce's Code, § 2631.
Wyoming.* Rev. Stats. 1899, sec. 4707.

§ 649. **Not to profit or lose by estate.** He shall not make profit by the increase, nor suffer loss by the decrease, or destruction, without his fault, of any part of the estate. He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made. **Kerr's Cyc. Code Civ. Proc., § 1614.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 866, p. 323.
Arizona.* Rev. Stats. 1901, par. 1849.
Idaho.* Code Civ. Proc. 1901, sec. 4237.
Kansas. Gen. Stats. 1905, § 3029.
Montana.* Code Civ. Proc., sec. 2772.
Nevada.* Comp. Laws, sec. 2965.
New Mexico. Laws 1901, sec. 31, p. 156.
North Dakota.* Rev. Codes 1905, § 8179.
Oklahoma.* Rev. Stats. 1903, sec. 1715.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1206.
South Dakota.* Probate Code 1904, § 267.
Utah.* Rev. Stats. 1898, sec. 3930.
Washington.* Pierce's Code, § 2632.
Wyoming.* Rev. Stats. 1899, sec. 4708.

§ 650. **Debts uncollected without fault.** No executor or administrator is accountable for any debts due to the decedent, if it appears that they remain uncollected without his fault. *Kerr's Cyc. Code Civ. Proc.*, § 1615.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.* Carter's Code, sec. 866, p. 323.
- Arizona.** Rev. Stats. 1901, par. 1850.
- Idaho.** Code Civ. Proc. 1901, sec. 4238.
- Kansas.* Gen. Stats. 1905, § 3030.
- Montana.** Code Civ. Proc., sec. 2773.
- Nevada.** Comp. Laws, sec. 2966.
- New Mexico.* Laws 1901, sec. 31, p. 156.
- North Dakota.** Rev. Codes 1905, § 8180.
- Oklahoma.** Rev. Stats. 1903, sec. 1716.
- Oregon.* Bellinger and Cotton's Ann. Codes and Stats., § 1206.
- South Dakota.** Probate Code 1904, § 268.
- Utah.** Rev. Stats. 1898, sec. 3932.
- Washington.** Pierce's Code, § 2633.
- Wyoming.** Rev. Stats. 1899, sec. 4709.

§ 651. **Compensation of representative and attorney.**
Appeal. He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as provided in this chapter; but when the decedent, by his will, makes some other provision for the compensation of his executor, that shall be a full compensation for his services, unless, by a written instrument, filed in the court, he renounces all claim for compensation provided by in the will. Any attorney who has rendered services to an executor or administrator may at any time during the administration, and upon such notice to the other parties interested in the estate as the court shall by order require, apply to the court for an allowance to himself of compensation therefor, and the court shall on the hearing of such application make an order requiring the executor or administrator to pay to such attorney out of the estate such compensation as to the court shall seem proper. Any payment made by an executor or administrator in conformity with such order shall be allowed by the court in his account. Any attorney making such application to the court for compensa-

tion and all other persons interested in the estate may appeal from any order made by the court fixing the amount of such compensation. **Kerr's Cyc. Code Civ. Proc.**, § 1616.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 867, p. 323.
- Arizona.** Rev. Stats. 1901, par. 1851.
- Idaho.** Code Civ. Proc. 1901, sec. 4240.
- Montana.** Code Civ. Proc., sec. 2774.
- Nevada.** Comp. Laws, sec. 2967.
- New Mexico.** Laws 1901, sec. 32, p. 156.
- North Dakota.** Rev. Codes 1905, § 8183.
- Oklahoma.** Rev. Stats. 1903, sec. 1717.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1207.
- South Dakota.** Probate Code 1904, § 269.
- Utah.** Rev. Stats. 1898, sec. 3933.
- Washington.** Pierce's Code, § 2634.
- Wyoming.** Rev. Stats. 1899, sec. 4710.

§ 652. **Not to purchase claims against estate.** No administrator or executor shall purchase any claim against the estate he represents; and if he pays any claim for less than its nominal value he is only entitled to charge in his account the amount he actually paid. **Kerr's Cyc. Code Civ. Proc.**, § 1617.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 866, p. 323.
- Arizona.*** Rev. Stats. 1901, par. 1852.
- Idaho.*** Code Civ. Proc. 1901, sec. 4239.
- Montana.*** Code Civ. Proc., sec. 2775.
- Nevada.*** Comp. Laws, sec. 2968.
- New Mexico.** Laws 1901, sec. 31, p. 156.
- North Dakota.*** Rev. Codes 1905, § 8181.
- Oklahoma.*** Rev. Stats. 1903, sec. 1718.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1206.
- South Dakota.*** Probate Code 1904, § 270.
- Utah.*** Rev. Stats. 1898, sec. 3931.
- Washington.*** Pierce's Code, § 2635.
- Wyoming.*** Rev. Stats. 1899, sec. 4711.

§ 653. **Commissions to representative. Extraordinary services.** When no compensation is provided by the will, or

the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; for the next fifty thousand dollars, at the rate of one per cent; and for all above one hundred thousand dollars, at the rate of one half of one per cent. The same commissions shall be allowed to administrators. In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary service, but the total amount of such extra allowance must not exceed one half the amount of commissions allowed by this section. Where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commission shall be computed on all the estate above the value of twenty thousand dollars, at one half of the rates fixed in this section. Public administrators shall receive the same compensation and allowances as are allowed in this title to other administrators. All contracts between an executor or administrator and an heir, devisee, or legatee, for a higher compensation than that allowed by this section, shall be void. **Kerr's Cyc. Code Civ. Proc.**, § 1618.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 869, p. 324.
- Arizona.** Rev. Stats. 1901, par. 1853.
- Colorado.** 3 Mills's Ann. Stats., sec. 4809.
- Idaho.** Code Civ. Proc. 1901, sec. 4241.
- Kansas.** Gen. Stats. 1905, §§ 3038, 3039.
- Montana.** Code Civ. Proc., sec. 2776.
- Nevada.** Comp. Laws, sec. 2969.
- New Mexico.** Comp. Laws 1897, sec. 1972.
- North Dakota.** Rev. Codes 1905, § 8184.
- Oklahoma.** Rev. Stats. 1903, sec. 1719.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1209.
- South Dakota.** Probate Code 1904, § 271.
- Utah.** Rev. Stats. 1898, sec. 3934.
- Washington.** Pierce's Code, § 2636.
- Wyoming.** Rev. Stats. 1899, sec. 4712.

§ 654. Form. Executor's renunciation of compensation.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Provision having been made in the last will and testament of _____, deceased, for the compensation of the executor therein named for his services as such executor, —

I, the undersigned, named as executor in said will, have elected to receive, in place of such compensation, the commissions allowed by law for such services, and hereby renounce all claim to the compensation provided for in said will.

_____, Executor, etc.

Dated _____, 19____.

Explanatory note. 1. Give file number.

§ 655. Allowance of fees for attorneys. Extraordinary services. Executors and administrators shall be allowed for fees of their attorneys for conducting the ordinary probate proceedings, the same amounts as are allowed by the last section as compensation for executors and administrators for their own services. In all cases, such further allowance may be made as the court may deem just and reasonable for any extraordinary service, such as sales or mortgages of real estate, contested or litigated claims against the estate, litigation in regard to the property of the estate, and such other litigation as may be necessary for the executor or administrator to prosecute or defend.

Sec. 3. Nothing in this act [§§ 1618, 1619] shall be construed to apply to any estate in course of administration at the time this act goes into effect. **Kerr's Cyc. Code Civ. Proc., § 1619.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1851.**Kansas.** Gen. Stats. 1905, § 3038.**Montana.** Code Civ. Proc., sec. 2776.

LIABILITIES AND COMPENSATION OF EXECUTORS AND ADMINISTRATORS. ATTORNEYS' FEES.

I. Liability of Executors and Administrators.

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| <ol style="list-style-type: none"> 1. In general. 2. Instances of liability. <ol style="list-style-type: none"> (1) For entire estate. (2) Liability in general. (3) In what capacity. (4) Liability for costs. (5) Contracts. (6) Mingling trust funds. (7) Rents, issues, and profits. (8) Bad loans. (9) Failure of bank. | <ol style="list-style-type: none"> (10) Failure to collect. (11) Losses through neglect. (12) Personal injuries. Conduct of decedent's business. (13) Liability for taxes. 3. Instances of non-liability. 4. When chargeable with interest. <ol style="list-style-type: none"> (1) In general. (2) Simple interest. (3) Compound interest. 5. Not to profit or lose by estate. |
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II. Compensation of Executors and Administrators.

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|---|---|
| <ol style="list-style-type: none"> 1. Provision for, in will. 2. Statutory allowance. 3. Basis. Computation. 4. Validity of agreements as to. 5. Not allowable until final settlement. 6. Renunciation. Waiver. 7. What should be allowed. | <ol style="list-style-type: none"> 8. What should not be allowed. 9. Further allowance. Extra services. 10. Co-executors. 11. Successive administrators. 12. Trustees. 13. Special administrators. 14. Appeal. |
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III. Attorneys' Fees.

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|---|--|
| <ol style="list-style-type: none"> 1. In general. 2. Province of court. 3. Statutory provisions. 4. Estate not chargeable. 5. Necessity of notice. 6. What is no waiver of fee. 7. Personal liability for. 8. What may properly be allowed. | <ol style="list-style-type: none"> 9. What cannot be allowed. 10. Reasonableness of fee. 11. Co-executors and special administrators. 12. Recovery of fee. 13. Recovery of more than amount allowed. 14. Appeal. |
|---|--|

I. LIABILITY OF EXECUTORS AND ADMINISTRATORS.

1. In general. An executor or administrator is chargeable not only with the assets which come into his possession, but also with those which, by negligence, he has failed to collect: *Estate of Kennedy*, 120 Cal. 458, 461; 52 Pac. Rep. 820. He is prima facie liable for such assets of the estate as come into his possession: *Wheeler v. Bolton*, 92 Cal. 159, 171; 28 Pac. Rep. 558. His liability can only terminate after compliance with the statute, and after a settlement approved by the court has been made, and after discharge and delivery has been ordered by the court: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 517. One who takes charge of an estate as administrator, and takes possession of the assets of the

estate of his decedent and administers thereon, cannot escape liability by reason of his having failed to take the oath and to file the bond required by law. If he is not an administrator de jure, he is de facto, and may settle the estate, if neither creditors nor heirs object: *Harris v. Coates*, 8 Ida. 491; 69 Pac. Rep. 475. If an executor, who has money of the estate in his hands, turns it over to his co-executor, and leaves the estate for an indefinite length of time, he is answerable for any misapplication of it by the latter: *Estate of Osborn*, 87 Cal. 1, 4; 25 Pac. Rep. 157; 11 L. R. A. 264. An administrator de bonis non is answerable only for what he receives. He is not liable for a misappropriation of the moneys received for land sold by a former administrator: *Dray v. Bloch*, 27 Or. 549; 41 Pac. Rep. 660.

2. Instances of liability.

(1) **For entire estate.** An executor or administrator is to be charged with all estate coming into his hands, real as well as personal, and at the value of the appraisement: *Wheeler v. Bolton*, 92 Cal. 159, 174; 28 Pac. Rep. 558; *Estate of Fernandez*, 119 Cal. 579, 584; 51 Pac. Rep. 851. The statute makes no distinction between real and personal estate, and the rule applicable in the case of loss by him of personal estate should have equal application to the loss of real estate; and if a liability for the loss of personal property is fixed at the date of the loss, so it must be for the loss of real estate: *Wheeler v. Bolton*, 92 Cal. 159, 174; 28 Pac. Rep. 558. An administratrix of the estate of her deceased husband, such estate being wholly community property, is liable to the extent of such estate to creditors of the community: *Carpenter v. Lindauer*, 12 N. M. 388; 78 Pac. Rep. 57. The executor or administrator is chargeable with all moneys coming into his hands: *Magraw v. McGlynn*, 26 Cal. 420, 429; *Estate of Sanderson*, 74 Cal. 199, 203; 15 Pac. Rep. 753. As to making settlement by legal tender, see *Estate of Den*, 39 Cal. 70; *Magraw v. McGlynn*, 26 Cal. 420. An administrator exchanging currency for gold is liable only for the gold received: *Estate of Sanderson*, 74 Cal. 199; 15 Pac. Rep. 753.

(2) **Liability in general.** As a general rule, one executor is not answerable for the neglect or bad faith of a co-executor, but where one, by his own negligence, suffers another to waste the estate, when, by the exercise of reasonable diligence, he could have prevented it, he will be held answerable for the loss: *Insley v. Shire*, 54 Kan. 793; 39 Pac. Rep. 713. An executor or administrator is answerable for an unauthorized expenditure of money. If there is any question of the legality of the outlay, he should protect himself by obtaining an express authorization for the expenditure from the parties in interest: *Estate of Kennedy*, 120 Cal. 458; 52 Pac. Rep. 820. He is answerable for selling property of the estate under an alleged mutual mistake of

law: *Snyder v. Jack*, 140 Cal. 584; 74 Pac. Rep. 139, 355. He is also answerable in damages where he makes a fraudulent sale of the decedent's real estate. He is liable in double the value of the land sold, as liquidated damages, to be recovered in an action by the person having an estate of inheritance therein, but his sureties are not so liable: *Weihe v. Statham*, 67 Cal. 245; 7 Pac. Rep. 673, 676. If an executor expends money in a suit which he commences to recover certain personal property, which he thinks belongs to the estate, and abandons the suit, he is not entitled to reimbursement for such expenditure: *Estate of Pease*, 149 Cal. 167, 169; 85 Pac. Rep. 149. If an executor wrongfully pays the shares of certain distributees to their pretended attorney, he is answerable for such wrongful payment, notwithstanding a judgment or decree discharging him from all liability to be incurred thereafter: *Bryant v. McIntosh*, 3 Cal. App. 95; 84 Pac. Rep. 440. If he sells certain cooperage at private sale, at a price in excess of the appraisement, without any order of court, or notice of sale, or order of confirmation, he is chargeable with the excess in actual value at the time of the sale, regardless of the amount received: *Estate of Scott*, 1 Cal. App. 740; 83 Pac. Rep. 85. He is also chargeable with money given him by decedent, just before the latter's death, and which was not given as a present: *Estate of Pease*, 149 Cal. 167, 170; 85 Pac. Rep. 149. If a broker is employed to procure a loan for an estate, or to effect a sale of its property, and does all that he was required to do under the contract, and procures a party who is willing and ready to make the loan or to purchase the property, he is entitled to the commission agreed upon; but the executor or administrator of the estate is personally liable therefor, unless there has been an express stipulation that the broker shall be paid only out of the estate: *Maxon v. Jones*, 128 Cal. 77, 81; 60 Pac. Rep. 516. An executor *de son tort* is subject to all the liabilities of an ordinary executor without being entitled to any of his privileges: *Slate v. Henkle*, 45 Or. 430; 78 Pac. Rep. 325, 326. An executor or administrator, as such, has no authority over property that it not assets of the estate; but he is answerable as an individual for wrongfully retaining it: *Lazarus v. Carter*, 11 Haw. 541, 543.

REFERENCES.

Liability of one executor or administrator for the acts and defaults of another representative: See note 42 Am. Dec. 288-293. Liability of co-executor for default of one permitted to manage estate: See note 11 L. R. A. (N. S.), 296-352. Liability of executor or administrator in a foreign jurisdiction for the property of decedent: See note 32 Am. Dec. 632-633. Liability of executor or administrator for funeral expenses: See note 33 L. R. A. 663-664. Liability of infant as executor or administrator: See note 57 L. R. A. 688-689. Liability of estates of decedents for contracts and torts of executors and admin-

istrators: See note 52 Am. St. Rep. 118-135. Liability for the debt of an executor or administrator owing to the estate: See note 112 Am. St. Rep. 406-414. Liability of administrator and his sureties for a debt owing by the former to the estate of his intestate, where the administrator is hopelessly insolvent: See note 61 L. R. A. 313-317.

(3) **In what capacity.** An executor or administrator cannot bind the assets of the deceased by his promissory note. If he executes a note, and adds to his signature, "as executor for" the deceased, he will nevertheless be personally liable. Yet, while the executor or administrator will be personally and alone bound upon the note, if that for which it was given was legally a claim against the estate, the giving and accepting the note will not, without more, discharge the estate. In general, an executor or administrator, like an agent, must expressly limit his promise to payment out of the estate represented, in order to avoid individual liability on it: *First Nat. Bank v. Collins*, 17 Mont. 433; 43 Pac. Rep. 499, 500. Where the statute does not authorize the administrator either to take possession of the real estate of the intestate, or to collect the rents and profits, but he takes possession thereof, he is not answerable therefor in his fiduciary or representative capacity to the estate: *Head v. Sutton*, 31 Kan. 616; 3 Pac. Rep. 280, 283. But if an executor or administrator applies to the use of the estate money or the proceeds of property belonging to a third person, he is answerable in both his individual and representative capacity, and the injured party may elect whether he will hold him in the one capacity or in the other; but, having elected to pursue the executor or administrator in his representative capacity, he must take such judgment as the law authorizes in such cases: *Collins v. Denny Clay Co.*, 41 Wash. 136; 82 Pac. Rep. 1012, 1015. An administrator is chargeable in his capacity as administrator with the amount received by him prior to his appointment as administrator: *Head v. Sutton*, 31 Kan. 616; 3 Pac. Rep. 280, 282.

(4) **Liability for costs.** The statute provides that when a judgment is given against an executor or administrator, he shall be individually liable for the costs. This provision was adopted by the legislature for the purpose of preventing executors or administrators from wasting the property of estates in speculative or unnecessary litigation, by making them, in every case, individually answerable for the costs recovered against them, and permitting them to recover from the estate only such costs as shall appear to have occurred in the bona fide discharge of their trust: *Hicox v. Graham*, 6 Cal. 167, 169. Costs in a probate proceeding cannot be allowed to counsel; if allowed at all, they must be awarded to the parties themselves: *Henry v. Superior Court*, 93 Cal. 569; 29 Pac. Rep. 230, 231. If a judgment for costs is recovered in an action against an executor or administrator, but

such costs are not, by the judgment, made chargeable only upon the estate, the defendant is individually liable for the costs, and plaintiff is entitled to execution therefor: *McCarthy v. Speed* (S. D.), 94 N. W. Rep. 411, 413. Where plaintiff, in an action against an executor or administrator as such, recovers costs, and has execution issued therefor, the defendant, in his individual capacity, may move the court to vacate and set aside sales made under such execution: *McCarthy v. Speed* (S. D.), 94 N. W. Rep. 411, 414.

REFERENCES.

Personal liability of executors and administrators for costs: See note 14 L. R. A. 696-707. Liability for costs: See note to § 646, division II, head-line 12, and division III, head-line 8, ante.

(5) **Contracts.** An executor or an administrator is, in ordinary cases, personally liable upon contracts made by him in his representative capacity, after the death of the person whom he represents, and which are supported by some new consideration: *Estate of Page*, 57 Cal. 238, 242; *Dwinelle v. Henriques*, 1 Cal. App. 387, 392. In an action brought by an executrix to recover the possession of land as property of the estate, where it appears that the defendant is in possession under a written lease, executed to him by the plaintiff, — therein described as “the executrix of the will of James Moffitt, deceased,” and signed “Mrs. M. M. Moffitt, Etx.,” — giving him the option to purchase the land during the term for the sum of \$1,575; and that he afterwards elected to purchase, and paid to the plaintiff, on account, the sum of five hundred dollars, and tendered the balance before the expiration of the term; that, on the faith of the contract, he made permanent improvements on the land, etc.; that plaintiff’s testator died seised of the land in question, leaving a will, under which she was the sole residuary legatee; and that, at the time of her agreement to sell the property to the defendant, the time for presentation of claims had passed, and all debts and legacies had been paid, leaving in her hands money much more than sufficient to pay all costs of administration, — the executrix thus became the sole beneficiary of the land in question; and if she was not empowered by the court to sell the land, her contract with the defendant was binding on her personally, and operated as an equitable transfer of the ownership of the property: *Moffitt v. Rosencrans*, 136 Cal. 416, 418; 69 Pac. Rep. 87. The rule is, that executors and administrators cannot, by virtue of their general powers as such, make any contract which will bind the estate, and authorize a judgment *de bonis decedentis*, but on contracts made by them for necessary matters relating to the estate they are personally answerable, and must see to it that they are reimbursed out of the estate. On a contract under which an executrix employed the plaintiff to drill a well on the property of the estate, the plaintiffs are not entitled to judg-

ment against the executrix, even in her personal capacity, where the court has acquired no jurisdiction over her. In such a case the proceedings cannot be amended and a personal judgment entered against the executrix: *Renwick v. Garland*, 1 Cal. App. 237; 82 Pac. Rep. 89, 90. The executor or administrator of the decedent has no power to bind the latter's estate by any note or bill he may make in his representative capacity. So, also, is it impossible for the executor or administrator to bind the estate by the acceptance of a bill drawn in settlement of a claim against the estate. In all such cases the executor or administrator is personally answerable, even though his signature is stated in the most explicit manner to have been made in his representative capacity: *First Nat. Bank v. Collins*, 17 Mont. 433; 43 Pac. Rep. 499. An executor may disburse and use the funds of the estate for purposes authorized by law, but may not bind the estate by an executory contract, and thus create a liability not founded upon a contract or obligation of the testator. Where a complaint charges the execution of the contract by an administrator in his individual capacity, it binds him individually, although it relates to matters connected with the estate; and where he enters into a contract upon a consideration executed subsequently to the death of the decedent, it is deemed his individual contract: *Painter v. Kaiser*, 27 Nev. 421; 76 Pac. Rep. 747, 749 (showing many forms in which this doctrine has been applied). If complaint is made against an executrix personally, she is liable individually on a contract made by her personally, and before her appointment as executrix, by which she agreed that, after her appointment, she would, without any decree of distribution, pay to the plaintiff, and the other legatees named in the will, the amount of their representative proportions of money which might come into her hands in excess of five thousand dollars: *Painter v. Kaiser*, 27 Nev. 421; 76 Pac. Rep. 747, 748. If an executor fraudulently induces an heir to loan him a sum of money bequeathed to her, but to which she is not entitled until she reaches twenty-one years of age, and the evidence shows that the executor procured the loan by concealing from the heir his failing financial condition, and by misleading her in other respects, the transaction is not only questionable, but absolutely void, and the executor cannot obtain his discharge so as to release the sureties on his bond until he has complied with the order of the court to deliver all property of the estate to the parties entitled thereto: *Ehrngren v. Gronlund*, 19 Utah, 411; 57 Pac. Rep. 268.

REFERENCES.

Liability of estate for commissions of broker or agent, who sells property: See note 64 L. R. A. 555-557. Individual liability of personal representatives under original contracts founded on a new consideration: See note 1 Am. & Eng. Ann. Cas., 769.

(6) **Mingling trust funds.** The mere fact that an executor or administrator mingles the profits of a sale of the estate he represents with his own funds does not justify charging him with interest thereon, because he has a right to their custody, and there is no provision of law which requires him to keep them separate from all other funds: *Estate of Sarment*, 123 Cal. 331, 333; 55 Pac. Rep. 1015. The limit of the liability of a trustee for mingling trust funds with his own, and for use in his own business, where it is not shown that a larger profit was realized therefrom, is the return of the principal, with legal interest thereon compounded annually. This rule is applicable alike to guardians and executors as to other trust relations: *Estate of Dow*, 133 Cal. 446, 450; 65 Pac. Rep. 890; *Estate of Hamilton*, 139 Cal. 671; 73 Pac. Rep. 578.

REFERENCES.

Liability for mingling trust funds: See head-line 5, post.

(7) **Rents, issues, and profits.** An executor or administrator is answerable for the rents and profits of decedent's land, where he occupies and uses it as his own: *Walls v. Walker*, 37 Cal. 424, 431; *Estate of Misamore*, 90 Cal. 169; 27 Pac. Rep. 68. But he is entitled to receive the rents and profits of the real estate of the decedent, accruing after the latter's death, until the estate is settled, or until delivered by order of the court to the heirs or devisees. Such rents and profits are assets of the estate: *Washington v. Black*, 83 Cal. 390; 23 Pac. Rep. 300, 301.

(8) **Bad loans.** In lending money on a mortgage of real estate, a degree of care is necessary, which, if omitted, will render the executor or administrator liable personally. If an executor lends funds on real estate, he must use care as to the title, and ascertain that the value of the premises mortgaged is such as will, in all probability, be adequate security for repayment whenever the money shall be called in. If this is not done, and loss ensues, the executor or administrator is answerable therefor: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 123; *Estate of Holbert*, 48 Cal. 627, 629 (showing circumstances under which he is and under which he is not answerable for loss, especially where he takes a second mortgage as security for the loan, or no security at all.

(9) **Failure of bank.** If an executor or administrator deposits the moneys of an estate in a bank, but allows it to remain after the time when, if he had fulfilled his duty, it would have been distributed and in the hands of those entitled, and the money is lost through a failure of the bank, he and his sureties are liable therefor, and the sum lost constitutes the measure of damages: *McNabb v. Wixom*, 7 Nev. 163,

171. If an executor or administrator, with moneys of the estate in his hands, deposits them in his own name in a bank or other institution which fails, without in some way designating such moneys as trust property, the loss must fall upon him. And his liability will not depend upon the good faith, prudence, or judgment with which apparently he may have acted, nor upon the fact that he may have disposed of his own funds in the same way: *Estate of Arguello*, 97 Cal. 196, 200, 202; 31 Pac. Rep. 937. But, under the uniform holding of courts that executors, administrators, and guardians are bound by no greater or higher responsibility than that which is imposed upon any agent or trustee, if such a one, in good faith, deposits money in a bank of good repute to the trust account, he ought not to be held liable for its loss in consequence of the failure of the bank: *In re Kohler's Estate*, 15 Wash. 613; 47 Pac. Rep. 30, 31.

REFERENCES.

Deposit of trust funds in bank by executors or administrators: See note 98 Am. St. Rep. 371-377. Liability of executor or administrator for loss of bank deposit: See note 7 L. R. A. (N. S.) 617-619.

(10) *Failure to collect.* An executor or administrator is chargeable not only with the assets which come into his possession, but also those which by negligence he has failed to collect: *Estate of Kennedy*, 120 Cal. 458, 461; 52 Pac. Rep. 820; *Maddock v. Russell*, 109 Cal. 417; 42 Pac. Rep. 139. And he is also personally liable for loss by his purchase of unsecured, uncollectable notes: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118. Where the executor or administrator has a note in his individual possession, and he allows an action on the same to become barred by the statute of limitations, the delay not being in consequence of any mistake in law or of advice given by an attorney, it is a simple failure on the part of the executor or administrator to do his duty, and he is answerable to the estate for the loss occasioned by his negligence in allowing the note to become outlawed: *Estate of Sanderson (Cal.)*, 13 Pac. Rep. 497, 498; 74 Cal. 199, 203; 15 Pac. Rep. 753. He is not chargeable with a failure to collect, however, unless it is shown that it was possible for him to collect: *Estate of Moore*, 72 Cal. 335; 13 Pac. Rep. 880. The mere failure to sue upon a note is not, of itself, negligence. It is only the failure to proceed when a reasonable prospect of collection is apparent that constitutes negligence: *Elizalde v. Murphy*, 4 Cal. App. 114; 87 Pac. Rep. 245, 246. The failure to "push" the collection of a note may be negligence, but is not necessarily so. The executor or administrator is not answerable with respect to a note uncollected without his fault: *Estate of Moore*, 96 Cal. 522, 525; 32 Pac. Rep. 584. An executor should make all reasonable exertion to collect even desperate debts due to an estate, but should only be held for moneys uncollected, when it appears that they were lost by his

want of proper management or effort; and the burden of proving that debts might, by proper effort, have been collected, lies with those who seek to make the executor liable for the loss: *Estate of Millenovich*, 5 Nev. 161, 184.

(11) **Losses through neglect.** An executor or administrator is chargeable with losses to the estate, occasioned through his neglect: *Estate of Carver*, 123 Cal. 102, 104; 55 Pac. Rep. 770. Whenever he does what the law prohibits, or fails to exercise reasonable care and diligence in the endeavor to do what the law enjoins, he and his sureties are liable for the damages consequent upon such act or omission: *McNabb v. Wixom*, 7 Nev. 163, 171. An administrator is answerable to the heirs of the deceased for money or other property that came into his hands, which, through his act or omission, has been lost to the estate: *Callan v. Savidge*, 68 Kan. 620; 75 Pac. Rep. 1010. And an executor or administrator is not necessarily to be charged with negligence in paying out more to redeem pledged personal property than the property is worth. The question of negligence depends upon the proof: *Estate of Armstrong*, 125 Cal. 603, 606; 58 Pac. Rep. 183. Nor is negligence to be imputed to an administrator for his failure to object to the proof of payment of taxes actually paid by a mortgagee, because the complaint did not allege such payment: *Estate of Armstrong*, 125 Cal. 603, 606; 58 Pac. Rep. 183. An executor or administrator is answerable for a loss to the estate he represents, arising from his failure to foreclose a mortgage taken as security for a loan of moneys of the estate, and allowing the statute of limitations to bar a recovery: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 125. An executor or administrator should not be charged with the loss arising from his failure to collect rents, or for his failure to lease lands of the estate for a larger rent, where such failure is not due to the lack of ordinary care and diligence on his part in the management of the business of the estate: *Estate of Moore*, 96 Cal. 522, 525; 32 Pac. Rep. 584.

REFERENCES.

Liability of an executor or administrator for negligence: See note 14 Am. Dec. 65, 66.

(12) **Personal injuries. Conduct of decedent's business.** An executor or administrator cannot commit a tort in his representative capacity, so as to charge the estate. If he commits a trespass, it is his individual and personal act, and not his representative act. And if he is carrying on the business of the decedent, he is individually answerable to a third person injured through the negligence of his servant employed in the business while acting within the scope of his employment: *Kalua v. Camarinos*, 11 Haw. 557, 558, 559.

(13) **Liability for taxes.** An executor or administrator is answerable for the value of certain real property lost to the estate by his neglect to pay the taxes thereon: *Estate of Herteman*, 73 Cal. 545, 546; 15 Pac. Rep. 121. The liability of an executor or administrator for taxes due on the estate he represents is official and not personal; and, upon his resignation or discharge, such liability is assumed by his successor in the same manner as is any other obligation of the estate: *San Francisco v. Pennie*, 93 Cal. 465; 29 Pac. Rep. 66, 69; but the extent of his representative accountability or liability for the property in his official capacity does not affect the question of its being liable to taxation. Though he has not the possession, yet he has a control, in so far that he may pay the lien, and would then be entitled to possession and absolute control: *Stanford v. San Francisco*, 131 Cal. 34, 36; 63 Pac. Rep. 145. An executor or administrator cannot be charged with notice of unpaid taxes on property which the deceased had conveyed in his lifetime, and in and to which he had no interest at the time of his death, and which did not become property of the estate or come into the custody of the executor or administrator: *Clayton v. Dinwoodey* (Utah), 93 Pac. Rep. 723, 726.

3. **Instances of non-liability.** Under the rule that an executor or administrator is not answerable for the loss of property, so long as he acts in good faith and with ordinary discretion, he is not answerable for money lost to the estate by the death or insolvency of an agent employed in another state to receive and forward to him money belonging to the estate, where such agent came well recommended to him: *Estate of Taylor*, 52 Cal. 477, 479. He is not negligent for his failure to have mortgaged property appraised, where it appears that it would be a useless expense: *Estate of Armstrong*, 125 Cal. 603, 608; 58 Pac. Rep. 183. An executor is not liable in lawful detainer for rent: *Martell v. Meehan*, 63 Cal. 47, 50. Nor is an administrator to be charged with the value of the property sold under an order of the probate court, without proof of any fraud whatever on the part of the administrator: *Richardson v. Sage*, 57 Cal. 212, 214. An executor or administrator, in the entire absence of proof, or presumption of advantage to himself, or of want of neglect of official duty, is not liable for punitive damages: *Wheeler v. Bolton*, 92 Cal. 159, 174; 28 Pac. Rep. 558. An executor or administrator cannot impose any liability on the estate by making, drawing, accepting, or indorsing any bill or promissory note, though he has authority to indorse negotiable instruments for the purpose of transferring the decedent's title when a transfer is necessary or proper. But such indorsement operates no further, so far as the estate is concerned, than to effect a transfer of title, and any liability which may arise on the indorsement is the personal liability of the executor or administrator. Where a man, after his wife's death, renewed notes previously executed by him

during the lifetime of his wife for their joint debt, he is not liable on such notes in his representative capacity, for the reason that he has no power to bind his wife's estate by the giving of a note: *Bank of Montreal v. Buchanan*, 32 Wash. 480; 73 Pac. Rep. 482, 483. An oral promise made by an executor to pay at maturity an individual note executed by his co-executrix, who is also a sole legatee of the estate, and which note was payable on or before three years after its date, is void under the statute of frauds, as being an agreement which, by its terms, is not to be performed within a year from the making thereof: *McKeany v. Black*, 117 Cal. 587, 591; 49 Pac. Rep. 710. And no executor or administrator is chargeable upon an oral promise to pay any debt of the decedent out of his own estate, except under the circumstances provided by the statute: *McKeany v. Black*, 117 Cal. 587, 593; 49 Pac. Rep. 710. Where a decedent, before his death, had agreed to buy certain bonds, provided their legality was examined into by a lawyer whose judgment was wanted, but death occurred before the bonds were tendered, such death operated to terminate the offer to buy, and it became a nullity. A subsequent tender to the administratrix was nugatory; and if the refusal of the administratrix to receive the bonds created a liability, it was a new liability incurred after the death of decedent, and while the administration of the estate was in progress. Such liability is not provable in the probate court where the claim was not a demand against the decedent existing in his lifetime; and the probate court having no jurisdiction, the remedy, if any, must be sought in another tribunal: *Riner v. Husted's Estate*, 13 Col. App. 523; 58 Pac. Rep. 793, 794. If an executor or administrator pays money in good faith, for the purchase of necessities for the support of helpless minor children of the intestate, at a time when they have no guardian, and the purchases are such as a guardian would have made if one had been appointed, such executor or administrator is not answerable for the money so paid in an action by a guardian thereafter appointed: *Calnan v. Savidge*, 68 Kan. 620; 75 Pac. Rep. 1010, 1012.

REFERENCES. .

Instances of non-liability: See head-line 2, subds. 2, 9, 11, ante.

4. When chargeable with interest.

(1) **In general.** Interest on the assets of an estate is not chargeable, as a matter of course, against the executor or administrator, but may be so charged if the circumstances of the particular case require it: *Estate of Holbert*, 39 Cal. 597, 601; *Wheeler v. Bolton*, 92 Cal. 159, 173; 28 Pac. Rep. 558. Whether any delay in prosecuting an order for the settlement of an estate could authorize the court to charge the executor or administrator with interest must be determined by the court upon the consideration of all the circumstances of the case, in-

cluding the character and condition of the estate, the causes of the delay, and whether it has been reasonable or unreasonable; and in any event the burden showing that he should be charged with interest is upon the contestant of his account: *Walls v. Walker*, 37 Cal. 424; 99 Am. Dec. 290; *Estate of Sarment*, 123 Cal. 331, 332; 55 Pac. Rep. 1015. Whether, in any instance, the executor is chargeable with even simple interest must be determined by the trial court from all the circumstances of the case. It cannot be said as a matter of law that interest is to be added to the value of property that has been lost by his neglect. The circumstances connected with its loss may so completely exonerate him from any charge of neglect that he would not be held liable for even its value, and his neglect may have been so technical that the court would not feel justified in requiring from him more than a restoration of the value of the property. The rule charging an executor or administrator with interest is limited to cases in which it is either shown or presumed that the representative has himself profited by his acts, or has been guilty of such wilful misfeasance as to justify the court in requiring from him compensation therefor: *Wheeler v. Bolton*, 92 Cal. 159, 173; 28 Pac. Rep. 558; *Estate of Marre*, 127 Cal. 128, 132; 59 Pac. Rep. 385. In all cases where he applies money of the estate to his own use, he ought to be charged with interest, either simple or compound, as the facts may justify: *Walls v. Walker*, 27 Cal. 424; 99 Am. Dec. 290; *Estate of Hilliard*, 83 Cal. 423; 23 Pac. Rep. 393. He is not to be charged with interest where no such claim is stated in the written grounds of contest: *Estate of Sylvar*, 1 Cal. App. 35, 37; 81 Pac. Rep. 663; *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 123. If he has, before final settlement of his accounts, appropriated money of the estate as commissions, he is not chargeable with interest on the amount from the time of its appropriation to the date of final settlement: *Estate of Carter (Cal.)*, 64 Pac. Rep. 484 (modifying *Estate of Carter*, 132 Cal. 113; 64 Pac. Rep. 123). So while the good faith of the administrator or executor is no defense against the loss of money or other property loaned by him, still he cannot be held answerable for the interest stipulated to be paid, unless he has collected or can collect it: *Estate of Moore*, 72 Cal. 335; 13 Pac. Rep. 880, 884. The general rule is, that an executor or administrator, except where he is charged with a special trust to invest money or interest, is not chargeable with interest unless he has actually received interest, or else, where, from some culpable delay in settling his accounts, it may be fairly inferred that he has made a profit out of the funds in his hands. If he appeals from an order of settlement and distribution, and it does not appear that he made, in the mean time, a net profit out of the fund of the estate in any way, and it does not appear that he could have invested the funds profitably in the mean time, he should not be charged with interest upon the funds in his hands for the time pending the delay occasioned by the appeal: *In re Davis'*

Estate, 33 Mont. 539; 88 Pac. Rep. 957, 960. It is manifest that executors and administrators should not be charged with interest prior to the dates at which they received money: Estate of Sarment, 123 Cal. 331, 334; 55 Pac. Rep. 1015. An executor or administrator is chargeable with interest where he unreasonably and without just excuse retains money in his hands; though he is not, as a general rule, chargeable with interest until the estate is in a condition to be settled: Estate of Espinda, 9 Haw. 342, 343, 344.

REFERENCES.

Executor or administrator should be charged with interest when: See note 99 Am. Dec. 296-299.

(2) **Simple interest.** The mere fact that an executor or administrator withdraws money of the estate from the bank in which it was drawing interest, where there was no apparent necessity for so doing, for the payment of debts or the expenses of administration, is not a reason for charging him with interest. If he decided in good faith, and in the exercise of his discretion that the interest of the estate demanded, that the money should be reduced into his actual possession, he is not liable for interest, merely because the money was withdrawn from the bank, in the absence of any showing that he acted in bad faith, or used the money in his private business, or mingled it with his own, or deposited it in bank to his own credit: Estate of McQueen, 44 Cal. 584, 588, 590. If he makes a loan in good faith, and the money is lost, he is not to be charged with the stipulated rate of interest upon the sum lost, nor even with the statutory rate of interest, unless it appears that he could with ordinary diligence have loaned the money to others at the statutory rate: Estate of Holbert, 48 Cal. 627, 630. He is not to be charged with even simple interest upon the funds of the estate which may be in his hands, unless it is made to appear to the court that the estate, or the parties interested in it, have sustained loss by reason of his negligence or fault: Estate of Sarment, 123 Cal. 331, 332; 55 Pac. Rep. 1015. Where an administrator filed two accounts, and there was no dereliction of duty as to the first, but was as to the second, he can be charged with interest only from the date of any actual dereliction of duty, which may have caused loss to the estate: Estate of Marre, 127 Cal. 128, 132; 59 Pac. Rep. 385. In a proper case the court may impose upon the executor or administrator a charge of interest upon a balance in his hands, as a penalty for delay in the administration: Estate of Armstrong, 125 Cal. 603, 608; 58 Pac. Rep. 183. But a penalty is not to be imposed upon an executor or administrator for loss arising from his deposit of funds of the estate with a private banker or with an individual. In many cases it would be safer, of course, to do so; and especially should he not be charged with interest where he has received no in-

terest, profits, or income from the estate. In all cases where he is called upon to pay the penalty of his neglect by being charged with interest, it is incumbent upon the parties alleging such neglect to prove it: *Estate of Sylar*, 1 Cal. App. 35, 37; 81 Pac. Rep. 663. An executor or administrator who uses money of the estate he represents in his own business and for his own profit is chargeable with interest thereon at the legal rate, with annual rests: *Estate of Merrifield*, 66 Cal. 180; 4 Pac. Rep. 1176; *Miller v. Lux*, 100 Cal. 609, 615; 35 Pac. Rep. 345, 639; *Estate of Pease*, 149 Cal. 167; 85 Pac. Rep. 149, 151. If he keeps money of the estate, to be used by himself whenever he wants it or needs it, and uses it for his own purposes, he is liable for interest without any proof that he has derived benefit by the use of the money: *Estate of Hilliard*, 83 Cal. 423, 428; 23 Pac. Rep. 393; *Estate of Gasq*, 42 Cal. 288. In cases of mere negligence, no more than simple interest is ever added to the loss or damage resulting therefrom: *Wheeler v. Bolton*, 92 Cal. 159, 172; 28 Pac. Rep. 558. An executor or administrator is properly charged with legal interest upon balances, with annual rests, where he is guilty of great delay in accounting: *Estate of Sanderson*, 74 Cal. 199, 215; 15 Pac. Rep. 753. An executor is chargeable with legal interest, computed with annual rests, upon moneys improperly advanced to his co-executor, as where he pays a sum of money as a family allowance to the widow, who is also one of the executors, but without any order of the court therefor: *Miller v. Lux*, 100 Cal. 609, 615; 35 Pac. Rep. 345, 639. An executor or administrator is liable for interest at the current rate for his failure to lend money of the estate in accordance with the provisions of the will: *Estate of Holbert*, 39 Cal. 597, 601. He is liable for interest on money of the estate which he has drawn and mingled with his own funds and omitted from his account: *Estate of Herteman*, 73 Cal. 545, 547; 15 Pac. Rep. 121. He is also liable for interest on money of the estate, improperly withdrawn for the purpose of paying a book-keeper, and such liability continues until the money is repaid to the estate: *Estate of Scott*, 1 Cal. App. 740; 83 Pac. Rep. 85, 87. Where an administrator neglects and fails to close and settle the estate of a decedent, if the same is ready for settlement and distribution, and thereafter attempts to have the whole of such estate set aside to him as sole heir or legatee, and he fails in such attempt, he must pay legal interest on all money in his hands ready for distribution from the time such distribution ought to have been made by him: *Harris v. Coats*, 8 Ida. 491; 69 Pac. Rep. 475.

(3) **Compound interest.** The general rule applicable to an executor or administrator, as well as to any other trustee is, that, except in cases in which he has been guilty of some positive misconduct, or wilful violation of duty, he is not to be charged with compound interest: *Wheeler v. Bolton*, 92 Cal. 159, 172; 28 Pac. Rep. 558; *Estate of*

Casner, 1 Cal. App. 145, 147; 81 Pac. Rep. 991; Estate of Sarment, 123 Cal. 331, 333; 55 Pac. Rep. 1015. But where he uses the funds of an estate in his own business, or for any purpose of his own, the well-established rule is to charge him with legal interest compounded annually from the date of appropriation, with annual rests, where it is not found that a higher rate of interest was realized from such use: *Miller v. Lux*, 100 Cal. 609, 615; 35 Pac. Rep. 345, 639; Estate of Clary, 112 Cal. 292, 295; 44 Pac. Rep. 569; *Merrifield v. Longmire*, 66 Cal. 180; 4 Pac. Rep. 1176; Estate of Clark, 53 Cal. 355; Estate of Stott, 52 Cal. 403. It is a general rule, applicable to an executor and administrator, as well as to any other trustee, that, where he has been guilty of positive misconduct or a violation of duty, compound interest may be allowed: Estate of Cousins, 111 Cal. 441, 452; 44 Pac. Rep. 182. An executor or administrator is not to be charged with compound interest from the mere fact that he deposited moneys of the estate in a bank managed by his brother, who was a surety on his bond, where there is no proof that the bank made any other use of the funds deposited than that made by banks of deposit in general: Estate of Sarment, 123 Cal. 331, 334; 55 Pac. Rep. 1015.

REFERENCES.

Liability of executor or administrator for compound interest: See note 29 L. R. A. 622-659. Reasons for adoption of rule making a representative chargeable with compound interest for mingling trust funds: See head-line 5, *infra*.

5. Not to profit or lose by estate. It is a well-established principle that the executor or administrator shall not profit or lose by the estate he represents: Estate of Holbert, 39 Cal. 597, 601; *Walls v. Walker*, 37 Cal. 424; 99 Am. Dec. 290; Estate of Rose, 80 Cal. 166, 173; 22 Pac. Rep. 86; *Firebaugh v. Burbank*, 121 Cal. 186, 191; 53 Pac. Rep. 560; *Magraw v. McGlynn*, 26 Cal. 420, 429. The executor cannot profit by his trust, except as provided by law; but if he does wrong or commits serious mistakes, he may lose: *Gibson v. Kelley*, 15 Mont. 474; 39 Pac. Rep. 506, 516. If he diverts the estate to his private business, he incurs the usual risk of loss, but shall have no corresponding hope of profit: Estate of Holbert, 39 Cal. 597, 601. If he undertakes to go beyond the strict line of his duty, he acts upon his own responsibility. He can derive no profit from the success of his venture, but must bear the loss of failure: Estate of Knight, 12 Cal. 200, 208; 73 Am. Dec. 531. If he uses the real estate of the estate, he must account for the rental value thereof, and if he makes a profit, he must account to the estate for that also: *Walls v. Walker*, 37 Cal. 424, 431; 99 Am. Dec. 290. If he elects to assume the peril of continuing the business of his decedent, and if he is permitted by the court and parties interested, without objection, to conduct and manage such business, the liabilities

growing out of the management are not claims which could be enforced against the estate by the owners thereof. They are his liabilities. He has a right to pay them out of the increase of the business, but if by so doing a loss is sustained to the estate, he must make the loss good. Protected from loss and from liability at all times, the estate is interested in the business only to the extent of its profits: *Estate of Rose*, 80 Cal. 166, 173; 22 Pac. Rep. 86. If he puts the personal estate to his own private use, he is chargeable with the value of its use or with the actual profits, if any, which the administrator has made by its use, at the election of the party interested in the distribution of the estate, and if loss has ensued thereby, he is not only not entitled to be made whole, but is, notwithstanding, liable for use, for so to use the property of the estate is a breach of his trust, and the profits which he may have made are the earnings of the estate, and must go with it: *Walls v. Walker*, 37 Cal. 424, 431; 99 Am. Dec. 290. It would be a most dangerous precedent to hold that an executor or administrator may speculate with the funds of the estate, or pay charges not allowed by law, though solely with a view of benefitting the estate, and then throw the loss upon the estate, and assign his good intentions as a defense to the injurious consequences of his acts: *Estate of Knight*, 12 Cal. 200, 208; 73 Am. Dec. 531. The rule as to the unlawful employment of the funds of the estate is quite simple. The estate is to suffer no loss, and the executor is to make no gain. This does not mean that the executor is to be charged for all money invested in speculating, and also with all that is received from it, but only that he must make good the loss resulting from the business, or if a profit has been earned, that he must account for it to the estate: *Estate of Smith*, 118 Cal. 462, 465; 50 Pac. Rep. 701. If the executor or administrator purchases real property of the estate in his own name, with money of the estate, a trust therein results to the heirs: *Merket v. Smith*, 33 Kan. 66; 5 Pac. Rep. 394, 397. A representative expressly authorized by a will to carry on the business of a testator for a time may do so under the direction of the probate court. One so authorized is not bound to incur the hazard, but if he does, the contracts made will be his own, and he will be individually bound by them: *Campbell v. Faxon*, 73 Kan. 675; 85 Pac. Rep. 760, 762. If an administrator buys a claim against the estate, for the benefit of the estate, and to avoid litigation, and it does not appear that such purchase resulted in gain to the administrator, he is entitled to reimbursement: *Furth v. Wyatt*, 17 Nev. 180; 30 Pac. Rep. 828, 829. If he sells stock in a corporation for more than its appraised value, he is liable for the amount received: *Estate of Radoovich*, 74 Cal. 536; 16 Pac. Rep. 321. In cases where the executor or administrator has mingled moneys belonging to his trust with his own funds, and used them for his own advantage, courts have charged him with compound interest upon the theory that, in the absence of evidence to the contrary, he will be presumed to have received such

profits from their use. The rule which makes an executor or other trustee chargeable with compound interest upon trust funds used by him in his own business is not adopted for the purpose of punishing him for any intentional wrong-doing in the use of such fund, but rather to carry into effect the principle enforced by courts of equity, that the trustees shall not be permitted to make any profit from the unauthorized use of such funds. The rule is intended to secure fidelity in the management of trust estates, and where the conventional rate of interest exceeds the statutory rate, the executor should, in such cases, be charged with legal interest, compounded annually, in order to fully reach the profit realized by him from the use of the trust fund: *Miller v. Lux*, 100 Cal. 609, 616; 35 Pac. Rep. 345, 639; *Wheeler v. Bolton*, 92 Cal. 159, 172; 28 Pac. Rep. 558; *Estate of Stott*, 52 Cal. 403.

II. COMPENSATION OF EXECUTORS AND ADMINISTRATORS.

1. **Provision for, in will.** A testator may, by his will, provide compensation for his executor different from that provided by the statute, and there appears to be no reason why he may not direct that his executor shall receive a portion of such compensation at stated intervals during the administration of the estate. No allowance, in such a case, can be made without the approval of the court, but, if the court at all times has the estate under its control, it can make such allowance, from time to time, as may be just, in view of the condition of the estate and to the extent that the administration has been completed: *Estate of Ringot*, 124 Cal. 45, 48; 56 Pac. Rep. 781. Provision for further compensation may also be made by will. Thus where the amount of compensation provided in the will was largely in excess of the commissions to which the executor would have been entitled if no provision had been so made, it is reasonable to suppose that when the testator appointed the manager of his farm to be one of his executors, he had this fact in mind, and made the appointment in order that, after his death, his estate might continue to receive the benefit of the services and experience of such manager, and that he fixed the amount of his compensation in contemplation thereof. The statement, in his will, that he deemed the commissions allowed by law to be insufficient compensation implies that they would perform other duties than those ordinarily required of an executor: *Estate of Runyon*, 125 Cal. 195, 196; 57 Pac. Rep. 783. In Hawaii, an administrator with the will annexed is not entitled to commissions, where the devisees under the will, which directs the sale of real estate, have elected, before any sale is made, to take the land instead of its proceeds: *Estate of Kraft*, 16 Haw. 159, 162.

2. **Statutory allowance.** When no compensation is provided by the will, the executor is entitled to commissions, at the rate specified by the statute, on all the estate which comes into his hands for which he

is answerable: *Estate of Isaacs*, 30 Cal. 105, 113; *Estate of Simmons*, 43 Cal. 543, 550. The commissions to be allowed to an executor or administrator are fixed by the statute. They are a designated percentage "upon the amount of the whole estate accounted for by him"; and the executor or administrator cannot be said to have "accounted for" an estate, in the sense of the statute, unless he shall have first taken it into his possession: *Estate of Simmons*, 43 Cal. 543, 550. The compensation of an executor, whether according to the rates fixed by the statute or as determined by the testator, is not a gratuity, but is in consideration of the services he may render, and the amount fixed by the statute is deemed ample compensation for the services ordinarily required: *Estate of Runyon*, 125 Cal. 195; 57 Pac. Rep. 783. Although an executor or administrator may have been guilty of neglect, or may have wasted, embezzled, or mismanaged the estate, he is not to be deprived of the compensation provided by law; though in such cases he will be charged with the loss and credited with his commission; so that, so far as necessary, his commissions will be applied to the payment of such losses: *Estate of Carver*, 123 Cal. 102, 104; 55 Pac. Rep. 770. The probate court has exclusive jurisdiction over the allowance or apportionment of the commissions of executors and administrators: *Hope v. Jones*, 24 Cal. 89, 94. Statutory commissions are provided for the faithful and proper performance of trusts. Hence if an administrator does not comply with the duties devolved upon him by his appointment, he is not, in Hawaii, entitled to commissions: *Estate of Akana*, 11 Haw. 420, 422. The claim of an executor or administrator to fees allowed by statute is not a contract, within the inhibition of the Federal statute, which prohibits a state from passing a law which impairs the obligation of contracts: *In re Dewar's Estate*, 10 Mont. 426; 25 Pac. Rep. 1026, 1029. The legislature has no constitutional power to increase fees in probate cases provided by the statute, which increase is based upon an ad valorem theory, and is regulated according to the amount of property owned by an estate: *Fatjo v. Pfister*, 117 Cal. 83; 48 Pac. Rep. 1012; *State v. Case*, 39 Wash. 177; 81 Pac. Rep. 554. In Hawaii, an administrator is not allowed commissions on specific chattels delivered in kind to an heir or legatee: *Estate of Kraft*, 16 Haw. 159, 161.

3. Basis. Computation. The commissions to which an executor or administrator will be entitled are purely matters of computation, and are based "on the amount of the estate" accounted for by him: *Estate of Straus*, 144 Cal. 553, 556; 77 Pac. Rep. 1122; *Estate of Simmons*, 43 Cal. 543, 551. If the executor or administrator is entitled to commissions "upon the amount of the estate accounted for by him," the inventory and appraisement may be looked to for the purpose of ascertaining the amount of the estate; but it does not necessarily follow that, in any case, the appraisement on file necessarily consti-

tutes the basis upon which the compensation is to be allowed. The valuation of the inventory was evidently not intended to be conclusive for any purpose. The administrator is chargeable, in his account, with the whole estate of the decedent which may come into his possession, and "at the value of the appraisement contained in the inventory"; but if any is sold for less than the appraisement, he is not answerable for the loss, if the sale has been advantageously made. The inventory may or may not afford a basis of calculation for the purpose of allowance of commissions upon property taken into possession and accounted for; but if resorted to in making such allowance, it cannot, in any case, amount to more than *prima facie* evidence of value, and the value should be left open to inquiry, if the inventoried value is not satisfactory to all parties concerned. If the administrator takes possession of the estate, and it is distributed to the heirs, it is to be "accounted for" by him, and if no objection is made by them to the valuation in the inventory, that valuation would form the basis of estimating his commissions. If the administrator sells the estate, or a portion of it, the amount received upon such sale becomes the evidence of its value to the estate, for which he has to account, and upon which his commissions are to be estimated: *Estate of Fernandez*, 119 Cal. 579, 584; 51 Pac. Rep. 851. In the absence of proof that the valuation of the property of the estate made in the inventory and appraisement is not fair and reasonable, the administrator should be allowed commissions on that valuation at the statutory rates: *Estate of Carver*, 123 Cal. 102, 106; 55 Pac. Rep. 770. The general rule is, that, where property subject to mortgage is sold, the executor or administrator is entitled only to have commissions on the net purchase price in excess of the encumbrance; but this rule does not apply where the mortgage was presented as a valid claim against the estate, and the sale is made to a third party. In such a case the executor or administrator is entitled to his commissions on the entire purchase price, as he is to be allowed commissions based on the value of the estate which has been taken into possession and accounted for: *Estate of Pease*, 149 Cal. 167, 171; 85 Pac. Rep. 149. As the appraised valuation of the estate is only *prima facie* evidence of its value, the court, in determining the compensation to be allowed the executor or administrator, may, if the value of the appraisement is questioned, take testimony as to the value, and base his judgment thereon. The compensation may therefore be computed on the value of the estate at the time of the settlement: *In re Sour's Estate*, 17 Wash. 675; 50 Pac. Rep. 587, 589; *In re Smith's Estate*, 18 Wash. 129; 51 Pac. Rep. 348; *Estate of Coursen* (Cal.), 65 Pac. Rep. 965, 986. It is contemplated by the law that an executor or an administrator shall receive, as his compensation for services performed, certain commissions based upon the value of the property which he has taken into his possession, and which, having been so taken into possession, has been "accounted for": *Estate of*

Davis, 6 Cal. App. 785, 788 (June 8, 1908). All matters of probate, including rights of inheritance, succession, testamentary disposition of property, and taxes upon inheritances, are subject to statutory control. It is by virtue of the statute that the heir or devisee is entitled to receive any of the estate of the decedent, and the authority which thus regulates the disposition of such property can subject it to any reasonable condition or expense. This is the basic principle that justifies the legislature in providing uniform fees for the services of executors and their attorneys in the proper administration of estates. The statute, in some jurisdictions, prescribes the exact rate of compensation which shall be allowed, and the courts cannot vary the amount which may be allowed, except so far as they may be authorized to award special compensation for extraordinary services; and it seems that the language of the statute, in most states, fixing the compensation of executors and administrators, precludes all discretion in this respect. A court can neither add to nor in any wise vary the compensation directed to be allowed by the statute. It can neither allow nor disallow commissions scaled by the degree of skill or of vigilance, of good or bad faith, displayed in the management of the estate, unless such discretion is vested in the court by such statute: Estate of Goodrich, 6 Cal. App. 730, 733; 93 Pac. Rep. 121, 122 (citing and quoting from Woerner on American Law of Administration, § 526). The court may reduce an administrator's commissions for his failure to settle up an estate within a reasonable time: Estate of Kain, 17 Haw. 514, 516.

4. Validity of agreements as to. The provision of the statute which makes void all contracts for higher compensation between an heir and an executor is not limited to contracts made directly between the executor and heir, but includes all contracts or agreements by which the executor would receive, either directly or indirectly, any greater compensation than has been fixed by the statute, or any compensation other than such as may have been previously ascertained and determined by the court, and applies to every contract which has for one of its objects the payment of such greater compensation, as well as to those which are made solely for such payment. A contract made in violation of this provision is against the policy of the law and is void: Firebaugh v. Burbank, 121 Cal. 186, 191; 53 Pac. Rep. 560.

5. Not allowable until final settlement. The commissions of an executor or administrator should not be allowed to him in the settlement of his annual account, but only when he has rendered his final accounts and the estate is ready for distribution: Estate of Miner, 46 Cal. 564, 572; Estate of Barton, 55 Cal. 87, 90; Estate of Levinson, 108 Cal. 450; 41 Pac. Rep. 483; 42 Pac. Rep. 479; Estate of Rose, 80 Cal. 166; 22 Pac. Rep. 86; Estate of Carter, 132 Cal. 113; 64 Pac. Rep. 123;

and they must be determined by the law then in force: *In re Dewar's Estate*, 10 Mont. 426; 25 Pac. Rep. 1026, 1029.

REFERENCES.

Executors' commissions are chargeable when: See note 5 L. R. A. 74.

6. Renunciation. Waiver. An executor or administrator may renounce his claim to compensation for the performance of the duties of his trust, and a promise made by him before his appointment, that he will not charge for his services, may be regarded as equivalent to the renunciation of his claim: *Estate of Davis*, 65 Cal. 309; 4 Pac. Rep. 22. But where the administrator was the agent of the decedent, prior to her death, for the purpose of collecting rents accruing from the real estate, and was also her legal adviser, a statement made by him to the intestate's husband, prior to his appointment as administrator, that he would protect the husband's interest and the interest of the heirs, in the same manner and to the same extent as he had theretofore protected the interest of the intestate, does not waive his right to an allowance of statutory fees for his services as administrator: *Noble v. Whitten*, 38 Wash. 262; 80 Pac. Rep. 451, 453. The right of an executor or administrator to commissions is not defeated, though he has waived his right to compensation, if such waiver has been withdrawn by consent of the court and without objection having been made thereto: *Estate of Carver*, 123 Cal. 102, 105; 55 Pac. Rep. 770. Where the compensation of an executor has been fixed by will, that is in "full compensation" for his services, unless he has renounced such provision: *Estate of Runyon*, 125 Cal. 195, 197; 57 Pac. Rep. 783. When the compensation of an executor has been provided for by will, and he would claim that his services entitle him to a greater compensation than that allowed by the statute, he must first renounce that provided by the will, and the court can then make him such allowance as will fully compensate him. But, until such renunciation is made, the provision in the will must be held to be "full compensation" for his services: *Estate of Runyon*, 125 Cal. 195, 197; 57 Pac. Rep. 783.

REFERENCES.

Agreements to relinquish compensation of executors or administrators, whether and when enforceable: See note 48 Am. Rep. 332, 333.

7. What should be allowed. On final settlement, an executor or administrator is entitled to commissions upon the whole value of the estate, both real and personal: *Ord v. Little*, 3 Cal. 287; *Estate of Isaacs*, 30 Cal. 105, 113; *Estate of Simmons*, 43 Cal. 543; *Estate of Miner*, 46 Cal. 564, 572. The fees of an administrator are expenses of administration, and are to be allowed in preference to funeral expenses: *Estate of Nicholson*, 1 Nev. 518. He is entitled to commis-

sions on funds which he is compelled by law to hold, protect, and guard: *Wells, Fargo & Co. v. Robinson*, 13 Cal. 133, 145. Under a statute which allows an executor or administrator a commission on the whole estate accounted for by him, at a certain percentage, the value of the real estate in his control should be included in fixing his compensation: *In re Sour's Estate*, 17 Wash. 675; 50 Pac. Rep. 587, 589; and, in the absence of proof that the appraised value of the real estate of the decedent is not the actual value thereof, he is entitled to the statutory commission on the appraised value: *Wilbur v. Wilbur*, 17 Wash. 683; 50 Pac. Rep. 589. Where he is, under the statute, entitled to the possession of his intestate's real estate, he is entitled to a commission on the appraised value thereof: *Noble v. Whitten*, 38 Wash. 262; 80 Pac. Rep. 451, 453. Where a mortgage has been presented as a claim against the estate, an executor is entitled to commissions on the whole amount for which the mortgaged property is sold, where he has charged himself with the sum for which the sale was made: *Estate of Pease*, 149 Cal. 167; 85 Pac. Rep. 149. Although the statute provides that "where the property of the estate is distributed in kind, and involves no labor beyond the custody and distribution of the same, the commissions shall be computed upon all the estate, above the value of twenty thousand dollars, at one half of the rates fixed in this section," yet, where the estate was appraised at a little over one hundred and seventeen thousand dollars, and the executor accounted for a little over one hundred and forty-five thousand dollars, the increase being made up of rents, interest, and dividends collected by him, and it appears that "all of the property belonging to said decedent at the time of his death, and then forming part of his estate, and which has not since been disposed of by said executor, is not now in the same form or condition in which the same was in at the time of the death of the said decedent, or at the time when it first came into the possession of said executor, and that all of the same cannot now be, and is not, distributed in kind; and that the property of the estate of said decedent, and the care, management, and administration thereof, by said executor, has necessarily involved, and the said executor has properly bestowed and expended thereon, labor beyond the mere custody and distribution of the same,"—it is proper for the court to allow to the executor, in the settlement of his final account, full commissions upon the property accounted for, instead of half commissions on or above the value of twenty thousand dollars, as provided in the statute: *Estate of Cudworth*, 133 Cal. 462, 463; 65 Pac. Rep. 1041. So, under such a statute, where it appears that the executor had been active in the management and the supervision of the estate, had performed services in collecting moneys due to it from various banks, and had settled the same for something over twenty-six thousand dollars, it was proper for the court, in fixing the commissions, to allow the legal rate of three per cent upon the value of the estate

over twenty thousand dollars: *Estate of Town*, 143 Cal. 507, 508; 77 Pac. Rep. 446. Where the conditions require the continuance of administration over a period of years, an executor or administrator may lawfully be allowed, at the close of each year, on the annual account, the commission provided by statute for the executor or administrator on moneys of the estate actually disbursed during the preceding year, by way of compensation for the care and management of the estate: *In re Ricker's Estate*, 14 Mont. 153; 35 Pac. Rep. 960, 965. It is a rule that all expenses of ancillary administration shall be paid from the assets within the jurisdiction which granted the ancillary letters. Hence where such administration is closed, and the assets have been transferred to the domiciliary administrator, it is proper for the court in which the latter administration is pending to allow the ancillary administrator his compensation as fixed by the court having charge of the ancillary administration: *Doss v. Stevens*, 13 Col. App. 535; 59 Pac. Rep. 67, 69. An administrator is entitled to credit for reasonable disbursements, costs, and expenses, and for commissions earned in the proper discharge of his trust during the time of his appointment, though such appointment is erroneous and voidable: *In re Owen's Estate (Utah)*, 91 Pac. Rep. 283, 285; *Rice v. Tilton*, 14 Wyo. 101; 82 Pac. Rep. 577. There seems to be no fixed rule of compensation where the administrator resigns, or is removed, leaving the administration incomplete: *Ord v. Little*, 3 Cal. 287, 289.

8. What should not be allowed. No fees or commissions should be allowed to an executor or administrator for property which does not come into his hands, but which is in the possession of other parties, who claim title to it adversely to the estate, although it is appraised, and included in the inventory: *Estate of Simmons*, 43 Cal. 543, 551; especially where, at the time, the property is involved in litigation, and a final judgment is subsequently rendered adverse to the estate: *In re Delaney*, 110 Cal. 563, 566; 42 Pac. Rep. 981; *Estate of Ricard*, 70 Cal. 69, 71; 11 Pac. Rep. 471. Neither should any fees or compensation be allowed to an executor or administrator for services voluntarily rendered, however great the benefit conferred: *Estate of Davis*, 65 Cal. 309, 310; 4 Pac. Rep. 22. No commission can be allowed an executor or administrator on property which never came into his possession, nor on property which, although it belonged to the estate, has not been administered on, and is not under the control of the probate court: *Steel v. Holladay*, 20 Or. 462; 26 Pac. Rep. 562. If letters testamentary are void, the executor is not entitled to commissions, fees, or charges in the settlement of the estate of his decedent: *Estate of Frey*, 52 Cal. 658, 661. So where an order appointing an administrator was afterwards reversed on appeal, he is not entitled to anything for attorneys' fees or costs expended by him in the contest: *Estate of Barton*, 55 Cal. 87, 88.

9. Further allowance. Extra services. The commission authorized by the statute to be allowed to an executor or administrator is the compensation fixed by law for his care of the property belonging to the estate, and the court is not authorized to make any additional allowance, unless he shall file a petition therefor, and show that he has rendered some extraordinary services. Hence the allowance to him, as commissions, of a sum in excess of the statutory percentage to which he is entitled is erroneous, in so far as it exceeds the percentage fixed by statute, where he has not petitioned the court for an extra allowance for extraordinary services, and it does not appear that he has rendered any such services: *Estate of Moore*, 96 Cal. 552, 527; 32 Pac. Rep. 584; *Estate of Delaney*, 110 Cal. 563, 566; 42 Pac. Rep. 981; and it must further appear to the court that the claim is just and reasonable: *Firebaugh v. Burbank*, 121 Cal. 186, 191; 53 Pac. Rep. 560. Unusual and extraordinary services of an executor or administrator for which the court is authorized to allow compensation are such as are not ordinarily required of an executor or administrator in the discharge of his trust; and his claim for such services should contain a statement of each special service claimed to have been rendered, with its particular value, and, until such an account is presented, no allowance should be made therefor: *Steel v. Holladay*, 20 Or. 462; 26 Pac. Rep. 562. A mere change of the character of the property, such as a collection of outstanding claims that had been distributed in kind, or the collection of policies of insurance for property destroyed by fire, does not entitle an executor or administrator to commissions upon the amount so collected, as the property of the estate would thereby only be changed in form but not increased in value, and no additional estate would be accounted for: *Firebaugh v. Burbank*, 121 Cal. 186, 190; 63 Pac. Rep. 560. Where the executor never applied to the county court for directions as to the manner of lending money of the estate, and for more than eight years made no report to the court of his dealings with such property in his possession, though required by statute to account therefor semiannually, the court will refuse to allow him any extra compensation for office rent or attorneys' fees: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 127. An agreement by the heir to compensate the executor or administrator for extraordinary services, or for expenses incurred in employing attorneys, other than may have been previously fixed by the court, is as fully within the prohibition of the statute making void all contracts for higher compensation between an heir and an executor, as an agreement to give him a greater rate of commission than is fixed by the statute. The relation between them is that of a trustee and his beneficiary, and the law presumes that such an agreement by the heir has been obtained by undue influence of the executor or administrator, and will not enforce it against the heir: *Firebaugh v. Burbank*, 121 Cal. 186, 191; 53 Pac. Rep. 560. When a lawyer becomes a voluntary administrator, he takes the

office cum onere, and although he exercises professional skill in conducting the estate, he does not thereby entitle himself to additional compensation. He is entitled only to the usual statutory commissions of an administrator: *In re Young's Estate*, 4 Wash. 534; 30 Pac. Rep. 643; *Noble v. Whitten*, 38 Wash. 262; 80 Pac. Rep. 451, 454. If the administrator himself is a lawyer, no additional allowance for costs and charges in collecting and defending the claims of the estate can be allowed him for legal services: *Doss v. Stevens*, 13 Col. App. 535; 59 Pac. Rep. 67, 70. For the same reason, and the additional reason that the administrator is presumed to have been appointed because of his ability and fitness to attend to and manage the estate, he should be required to exercise his professional skill and to conduct the business of the estate himself, unless there is necessity shown for the employment of legal assistance. Where there is no litigation concerning the administration of the estate, and there are no legal or other complications, and the administrator himself is an attorney, competent to transact all the business connected with the administration, there is no necessity at all for the employment of an attorney to assist him. He should be required to conduct business of the estate without extra compensation: *Noble v. Whitten*, 38 Wash. 262; 80 Pac. Rep. 451, 454. The fact that during the early years of the administration one acted as attorney and co-executor does not entitle him to extra compensation: *Estate of Coursen* (Cal.), 65 Pac. Rep. 965, 968.

10. Co-executors. The partnership relation does not exist between co-executors, and they have no joint interest in the commissions allowed by law for services in administering upon the estate. They are not each entitled to an equal share, merely upon the naked ground of their relation to each other. The share to which they are respectively entitled is to be determined on entirely different considerations. In other words, their respective portions are not ascertained by any established rule of law, but on the principle of equality. The ratio of compensation and of services must be the same, or as nearly so as the circumstances of the case will permit. One who takes no care or charge upon himself, touching the estate, or any part thereof, collects no debts, makes no disbursements, and thus renders no service whatever, is not entitled to any share in the commissions: *Hope v. Jones*, 24 Cal. 89, 92. The law declares that the commission should be apportioned to each executor in proportion to the labor he has performed: *Estate of Carter*, 132 Cal. 113, 114; 64 Pac. Rep. 123. The court has power to divide commissions between two joint administrators, and its action will not be disturbed on appeal, where no abuse of discretion or error of law is shown: *Estate of Dudley*, 123 Cal. 256, 257; 55 Pac. Rep. 897. A contract entered into between executors and devisees, as to the apportionment of commissions between them, cannot be considered on the hearing of the final account by the probate court. That is not

the place to settle disputes of this character. It is a matter which should be heard in another forum: *Estate of Carter*, 132 Cal. 113, 114; 64 Pac. Rep. 123. A co-executor is not entitled to his commissions until the settlement of the final account; and if the apportionment of commissions has been made equally to each executor, based upon an implied finding that there was no substantial difference in the amount of services performed by each, and the evidence is fairly conflicting, the apportionment will not be disturbed on appeal: *Estate of Carter*, 132 Cal. 113, 114; 64 Pac. Rep. 123. Where co-executors render separate accounts, the probate court should fix the compensation of each in proportion to the services rendered: *Hope v. Jones*, 24 Cal. 90, 93.

11. Successive administrators. There is but one aggregate sum to be allowed as commissions, which, in the case of successive administrations, must be apportioned by the court. There is, however, no basis upon which to make an apportionment until the closing of the estate. Sound judgment cannot determine how much the first administrator is entitled to, unless the court knows and considers what the successor has done, and what the comparison is between his acts and those of his predecessor. The administration of an estate is an entirety. There may be different persons in office, at different times, or at the same time; but the claim of each to compensation must be considered with reference to each and all of the others: *In re Owen's Estate* (Utah), 91 Pac. Rep. 283, 285; *Estate of Barton*, 55 Cal. 87, 90; *Ord v. Little*, 3 Cal. 287. The allowance of commissions to the first of two successive administrators, if made before the closing of the estate, is premature: *In re Owen's Estate* (Utah), 91 Pac. Rep. 283, 285. Where one administrator has resigned, and has been succeeded by another, and some commissions have been paid, the proper time to make an allowance to each, of his reasonable proportion of commissions, is upon the final settlement of the estate: *Estate of Levison*, 108 Cal. 450; 41 Pac. Rep. 483, 485; *Estate of Barton*, 55 Cal. 87, 90.

12. Trustees. In the absence of any direction in the will, or any evidence in relation thereto, the duties of a trustee named in the will, or any evidence in relation thereto, the duties of a trustee named in the will, even though he be the person named as executor, would not begin until the duties of the executor have terminated; and until he commences to exercise his duties as trustee, he is not entitled to compensation therefor. If such person takes possession of the property immediately upon his appointment as executor, and continues to administer the estate until the termination of his trust, the burden is upon him, if he would claim the compensation of a trustee rather than that of an executor, to establish the point of time at which his official character took place: *Bemmerly v. Woodard*, 136 Cal. 326, 331; 68 Pac. Rep. 1017. Trustees under a will are entitled to no compensation, con-

missions, or fees, under the will, for their management and care of property over which they have no control by virtue of any power under the will: *Blackenburg v. Jordan*, 86 Cal. 171; 24 Pac. Rep. 1061; *Berghauser v. Blanckenburg*, 86 Cal. 316; 24 Pac. Rep. 1062.

13. Special administrators. Where the statute does not make any special provision for the compensation of a special administrator, but leaves it to the discretion of the court, in the settlement of his account, it is not improper for the court to take the rate of compensation fixed by the statute for an administrator as the standard for determining a proper allowance to be made to him: *Estate of Moore*, 88 Cal. 1, 4; 25 Pac. Rep. 915.

14. Appeal. An allowance of two hundred dollars for eight months' work in closing out a stock of goods, under the order of the court, will not be disturbed on appeal, where the statute authorized the court to allow an extra amount for extraordinary services: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 523. Neither will an order allowing an administrator a designated sum in addition to his statutory commissions, as a reasonable compensation for extraordinary services, be disturbed on appeal, where the appellant has not shown himself to be entitled to any more: *In re Partridge's Estate*, 31 Or. 297; 51 Pac. Rep. 82, 83. So where the testator provided, in his will, that "for the purpose of settling my estate my executors shall be deemed executors; and for the purpose of managing my estate as aforesaid, and of investing the income not used for the said support and maintenance, and increasing the capital of my estate, they shall be deemed trustees, and shall be entitled to just compensation for their services," the provision relating to just compensation includes the settlement as well as the management of the estate; and if the court finds that the sum allowed is a just compensation, in addition to allowing it as the percentage provided by the statute on the value of the estate its judgment will not be disturbed on appeal: *In re Smith's Estate*, 18 Wash. 129; 51 Pac. Rep. 348. Where the appellate court has jurisdiction in all probate matters, and the legislature has authorized an appeal from an order settling the account of an executor, irrespective of the amount involved, the fact that the share of the commissions, in excess of the amount which should have been allowed, is less than three hundred dollars cannot defeat the appellate jurisdiction: *Estate of Delaney*, 110 Cal. 567; 42 Pac. Rep. 981. The refusal of the court below to allow an executor or administrator extra compensation will not be disturbed upon appeal where the evidence does not disclose any abuse of discretion by the trial court: *Estate of Hedrick*, 127 Cal. 184, 188; 59 Pac. Rep. 590. In the absence of a showing as to the amount of the estate accounted for, as a basis from which to estimate commissions, it will be presumed, on appeal, that the allowance made by the court below

fully meets the statutory requirement, where it does appear that the amount allowed covers the amount of the estate specifically shown: *In re Mason's Estate*, 26 Wash. 259; 66 Pac. Rep. 435, 437

III. ATTORNEYS' FEES.

1. *In general.* There is no such office or position known to the law as "attorney of an estate." When an attorney is employed to render services in procuring a will to probate, or in settling the estate, he acts as the attorney of the executor or administrator, and not of the estate, and for his services the executor or administrator is personally answerable: *Estate of Ogier*, 101 Cal. 381, 385; 40 Am. St. Rep. 61; 35 Pac. Rep. 900. While, in the settlement of the account of an executor or administrator, he will be allowed all necessary expenses in the care, management, and settlement of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings for suits in court, still, such allowance can be made only to him, and not to the attorney. Such allowance does not depend, in any way, upon contract between the administrator or executor and the attorney, but is an allowance made as a necessary expense of administration: *Estate of Ogier*, 101 Cal. 381; 40 Am. St. Rep. 61; 35 Pac. Rep. 900; *Estate of Levinson*, 108 Cal. 450; 41 Pac. Rep. 483; 42 Pac. Rep. 479; *Estate of Kruger*, 123 Cal. 391; 55 Pac. Rep. 1056; *Briggs v. Breen*, 123 Cal. 657; 56 Pac. Rep. 633, 886; *McKee v. Soher*, 138 Cal. 367; 71 Pac. Rep. 438, 649; *Estate of Kruger*, 143 Cal. 141; 76 Pac. Rep. 891; *Sullivan v. Lusk*, 6 Cal. App. Dec. 30; 94 Pac. Rep. 91. An attorney's fee may or may not be an expense of administration, according to the circumstances of each case: *In re Nicholson*, 1 Nev. 518. As fees of counsel are to be allowed out of the estate to the executor or administrator, it is error to direct that payment be made out of the estate to the attorneys: *Estate of Levinson*, 108 Cal. 450, 458; 41 Pac. Rep. 483; 42 Pac. Rep. 479. An executor or administrator has the right to have the court, in the first instance, determine what amount shall be allowed as an attorney's fee before he pays the same. He is not required to make payment of the fee before an allowance thereof by the court: *Estate of Dudley*, 123 Cal. 256, 257; 55 Pac. Rep. 897. Where a statute makes void all contracts for higher compensation between heir and executor or administrator, an agreement by the heir to compensate the executor or administrator for expenses incurred in employing attorneys other than such as may have been previously fixed by the court is as fully within the prohibition of the statute as to give a greater rate of commission than is fixed by the statute: *Firebaugh v. Burbank*, 121 Cal. 186, 191; 53 Pac. Rep. 560. While it is true that the allowance to be made for commissions, attorneys' fees, and charges to close the administration of an estate cannot be definitely fixed until the final settlement of the account of the executor, yet where the account filed by the executor immediately prior to the hearing for

partial distribution is, for all practical purposes, a final account, and it, together with the accompanying exhibit, the inventory and appraisal, and the general proceedings in the estate, supplemented by the evidence upon the hearing, provides sufficient data from which the court may determine what would be a prudent, safe, and proper amount to be retained by the executor for the payment of his commissions, attorneys' fees, and expenses to be allowed on final settlement, it is proper for the court to determine such amount, where he retains more than the largest amount of commissions which, under any circumstances, the executor or administrator could obtain: *Estate of Straus*, 144 Cal. 553, 556; 77 Pac. Rep. 1122. An attorney who has been employed by an executor has no lien upon the estate for his services: *Waite v. Willis*, 42 Or. 288; 70 Pac. Rep. 1034, 1035. If an application for the allowance of compensation for extraordinary services of an attorney for the executor of a will has been denied, with the privilege of renewing the same, a second application for such allowance may be made: *Estate of Riviere*, 7 Cal. App. Dec. 312, 313 (Sept. 10, 1908).

REFERENCES.

Allowance of attorneys' fees in suit for administration of decedent's estate: See note 54 L. R. A. 817, 820. Power of administrators to make estates of decedents liable for attorneys' fees: See note 93 Am. Dec. 393-397.

2. Province of court. An executor or administrator has no power to make a contract with an attorney to give him an interest in the property of the estate as compensation for his services in recovering it: *Estate of Page*, 57 Cal. 238, 241. But, whatever the agreement may be between the executor or administrator and the attorney, the sole question for the court in probate in any case is as to the amount that shall be allowed to the executor or administrator for legal services from the funds of the estate, and of this question the court in probate has sole and exclusive jurisdiction. The question as to what the attorney shall receive from the executor or administrator is an entirely different question, one of which the probate court has no jurisdiction, and is dependent altogether for its determination upon the agreement of the parties: *Estate of Kruger*, 143 Cal. 141, 145; 76 Pac. Rep. 891. Those who render services of any kind to an executor or administrator for the purpose of assisting him in the execution of his trust must look to him alone for their compensation; and while the court in probate has the sole and exclusive jurisdiction to determine what amount shall be allowed to the executor or administrator from the estate for any such services rendered by him through others, it cannot adjudicate between him and those whom he employs to assist him: *Estate of Kruger*, 143 Cal. 141; 76 Pac. Rep. 891. The court has no power, in the absence of a stipulation, to fix an attorney's fee in an estate, but it can, and must,

determine whether a fee charged is a reasonable sum to be charged to the estate on account of legal services rendered to the estate: *Estate of Brignole*, 133 Cal. 162, 164; 65 Pac. Rep. 294. To justify a court in allowing to the executor or administrator a fee for the services of an attorney, the court must find that the services were needed by the estate, and were of advantage thereto, and were not in lieu of the duties imposed upon such executor: *Estate of Brignole*, 133 Cal. 162; 65 Pac. Rep. 294; *Firebaugh v. Burbank*, 121 Cal. 186, 191; 53 Pac. Rep. 560. It being within the jurisdiction of the court in probate to fix the compensation which shall be allowed to the attorney of the personal representative of the deceased, it not only has jurisdiction to fix the value of services rendered by an attorney to the executor or administrator, on behalf of the estate, as an expense of administration, but has exclusive original jurisdiction to adjust and enforce such demand, and having jurisdiction, it must of necessity have power to do full and complete justice between the parties; and where an attorney contracts with the representative of the estate, knowing that, in law, the value of his services, so far as they are to be a burden upon the estate, is to be fixed by the court in probate, he cannot be heard to say, if dereliction is charged against him, that the question is one not cognizable before that court, to which alone he must look for compensation. It is the duty of the court, in determining the compensation, to hear all evidence pertinent to the consideration, and it would indeed be extraordinary if an attorney, in support of his claim for compensation could be heard to urge his faithful performance of duty, and that, in answer, the opposing heirs should not be permitted to show that, by reason of his culpable dereliction, he was entitled to less compensation, or to none at all: *Estate of Kruger*, 123 Cal. 391, 394; 55 Pac. Rep. 1056. Where the court has before it sufficient data from which to determine what would, in all probability, be a reasonable compensation for an attorney's fee, it is not necessary that any evidence of a professional nature should be introduced upon this subject. The court, of its own knowledge and experience, may determine what would be a reasonable fee, where all the proceedings in the estate, and all matters in which the executor or administrator could have enlisted or required the services of an attorney, are before the court: *Estate of Straus*, 144 Cal. 553, 557; 77 Pac. Rep. 1122. The court is not bound to fix the amount of the fee in accordance with the opinion of expert witnesses as to the value of the services of an attorney: *Freese v. Pennie*, 110 Cal. 469; 42 Pac. Rep. 978; *Estate of Dorland*, 63 Cal. 281.

3. Statutory provisions. It is a constitutional exercise of power for the legislature to provide for definite fees to be awarded to executors and administrators for their own services, and also an allowance to be made to them for their necessary expenses in the administration to

be made to them for their necessary expenses in the administration of the estate, including reasonable attorneys' fees; and there seems to be no difference, in principle, between an act establishing certain fees for the services of an executor or administrator, and one providing what he shall be allowed as payment for the services as an attorney. The latter is as much a part of the necessary expenses of administration as is the former. In fact, under our practice, the services of an attorney are not only essential, but the burden and responsibility of his work are usually much greater than those of the executor or administrator. It is competent, therefore, for the legislature to provide, as it has done, for the compensation in each instance, and the court can neither add to nor in any wise vary the compensation directed to be allowed by the statute. *Estate of Goodrich*, 6 Cal. App. 730, 733; 93 Pac. Rep. 121, 122. The late California statute modifies the previous law on the subject, authorizing reasonable attorneys' fees, etc., and provides a uniform standard. And the law is valid, as providing for reasonable attorneys' fees: *Estate of Goodrich*, 6 Cal. App. 730, 732; 93 Pac. Rep. 121, 122. There is nothing in the law to prevent an executor from making a contract with an attorney to perform legal services for the estate for less than the fees provided by the statute, and in that event he would obviously be allowed only his actual expenditure. But where the contract was for the full amount, and it was actually disbursed by the executors, the court should not reduce it: *Estate of Goodrich*, 6 Cal. App. 730, 734; 93 Pac. Rep. 121, 122. If an executor or administrator has been removed, the expenses incurred by the former executor or administrator for attorneys' fees, in the performance of his duties, and presumably incident to his trust, is a claim for which his successor becomes liable, and it is not material whether the former executor or administrator ever filed any final report, as that is not a prerequisite to the allowance of an attorney's fee: Attorneys' fees may be allowed prior to final settlement: *In re Miller's Estate*, sub nom. *Knight v. Hamaker*, 40 Or. 424; 67 Pac. Rep. 107, 109. Authority to award costs in probate proceedings comes from the statute, but this does not include an attorney's fee. They are not, in any proper sense, a part of the costs: *Estate of Olmstead*, 120 Cal. 447, 454; 52 Pac. Rep. 804.

4. Estate not chargeable. It is well settled that an attorney cannot hold an estate liable for services rendered to the executor or administrator. His services are performed for and on behalf of the representative, for the purpose of assisting him in the execution of his trust. It is true that the executor or administrator shall be allowed all necessary expenses in the care and management of the estate, including reasonable fees paid to attorneys for conducting the necessary proceedings in suits in court, but such fees are allowed to the executor or administrator, and not to the attorney. The estate is not

liable, but the executor or administrator is personally answerable: *McKee v. Soher*, 138 Cal. 367, 370; 71 Pac. Rep. 438, 649; *Estate of Kruger*, 143 Cal. 141, 145; 76 Pac. Rep. 891; *Firebaugh v. Burbank*, 121 Cal. 186, 191; 53 Pac. Rep. 560. The attorney employed by an executor or administrator to assist him in the execution of his trust has no claim that he can enforce against the estate, either by action or in any other way. His claim is solely against his client, the executor or administrator: *Estate of Kruger*, 143 Cal. 141, 144; 76 Pac. Rep. 891. The estate is not chargeable with the claim of an attorney at law for professional services rendered in pursuance of a contract between himself and the heirs of a decedent, in compelling the executor of the decedent to hasten his administration:: *Estate of Stuttmaster*, 75 Cal. 346, 348; 17 Pac. Rep. 223. An executor or administrator cannot charge the estate with expenses incurred in advising with counsel whom he knows at the time to be representing interests and demands antagonistic to the claims of the heirs as such, and with respect to those very interests. He cannot, in any case, or in any manner, either by advice or otherwise, litigate any claim or demand of one legatee or heir at the expenses of the estate, for this would be compelling a legatee or heir to pay for the institution and maintenance of litigation directed against himself; and this principle applies to litigation in matters of difference between parties who are not heirs and legatees and those who are: *In re Davis' Estate*, 31 Mont. 421; 78 Pac. Rep. 704, 705. An attorney's fee contracted in prosecuting letters of administration is not a proper charge against the estate. Such a debt is one contracted in advance of any authority on the part of the representative to obligate the estate to pay therefor, and is a personal liability only: *Bowman v. Bowman*, 27 Nev. 413; 76 Pac. Rep. 634, 636; *Wilbur v. Wilbur*, 17 Wash. 683; 50 Pac. Rep. 589. Whether the application for letters be successful or not, the estate is not to be charged with an attorney's fee for the applicant: *Estate of Simmons*, 43 Cal. 543, 547. The cases, however, are not harmonious on the question as to whether a counsel fee can be allowed to the successful applicant for letters of administration. Some of the cases hold that it may be allowed, and others not: See cases cited in *Bowman v. Bowman*, 27 Nev. 413; 76 Pac. Rep. 634. If a person is appointed administrator, and subsequently a document is found which purports to be a will, and which is offered for probate, and the administrator, in contesting such probate, incurs an expense for attorneys' fees for such purpose, the estate cannot be charged with the compensation for the services of such attorneys: *Estate of Parsons*, 65 Cal. 240; 3 Pac. Rep. 817. An executor or administrator is clearly not entitled to reimbursement out of the estate for fees paid to an attorney for services rendered, not to the estate, but to himself personally; but where it is clear from the evidence that the fees were paid out in matters strictly involving business of the estate; that the services were rendered the administrator in

consultation, advice, and in proceedings relating to the administration of the estate, and that no charges were made for personal services rendered to the executor or administrator individually, and the charges are reasonable,—it is proper for the court to allow his claim: *Rice v. Tilton*, 14 Wyo. 101; 82 Pac. Rep. 577, 579. Where an administration has extended over a period of years, and where attorneys were retained generally, and represented the estate in all litigation during that time, an account for services rendered is sufficiently itemized, where such account gives the date of the commencement and the date of the closing of such services, with the total amount claimed for the whole period: *In re Davis' Estate*, 31 Mont. 421; 78 Pac. Rep. 704, 705. An attorney's fee may or may not be a proper charge as an expense of administration, dependent on the necessity for an attorney; it is not incumbent on every administrator to employ an attorney: *Estate of Nicholson*, 1 Nev. 518, 521. The employment of an attorney by an executor or administrator is a personal matter, in no way binding upon the estate. But if the services are necessary, the executor or administrator may be allowed out of the estate a sufficient amount to compensate him for such employment: *Waite v. Willis*, 42 Or. 288; 70 Pac. Rep. 1034, 1035.

5. Necessity of notice. The compensation of the attorney of the executor or administrator, while not a claim against the estate, is an expense of administration, allowed to the representative, the amount of which is to be fixed by the court and paid out of the estate; but such an order for the payment of money, by which the property of the heirs, legatees, and devisees is to be taken from them, cannot be made without notice, and an opportunity to them to be heard: *Estate of Kruger*, 123 Cal. 391; 55 Pac. Rep. 1056; *In re Sullivan's Estate*, 36 Wash. 217; 78 Pac. Rep. 945, 947. Ordinarily, the account of the executor or administrator includes the item of attorneys' fees as an expense of administration; and when the notice required by law, of the hearing and settlement of the account, is duly given, the parties in interest are afforded an opportunity of contesting that, with any other items which fail to meet their approval; but where the final account of the executor or administrator contains no hint or suggestion that it was proposed to make any charge on account of the services of an attorney, an order of the court fixing the compensation of the attorney, without notice to the parties in interest, is void, though upon all matters properly embraced within the account due notice is given: *Estate of Kruger*, 123 Cal. 391; 55 Pac. Rep. 1056. If an executor or administrator pays money to himself for his own services, or makes payment for attorneys' fees, pending the course of the administration, without due hearing upon notice, he does so at his peril, for the court can enter no orders or judgment that will protect him, until the interested parties are before it, or until they have been properly notified:

In re Sullivan's Estate, 36 Wash. 217; 78 Pac. Rep. 945, 946. If the statute authorizes the court to appoint an attorney to represent devisees and legatees who are minors, and have no general guardian, and to fix the fee of the person so appointed, it will be presumed that the order fixing the attorney's fee, under such appointment, to represent the minor heirs, was made on notice; and this presumption prevails, unless the record affirmatively shows notice was not given. The mere fact that there never had been any previous account filed by the executor or administrator, though such fact is shown by the record, does not conclusively establish want of notice to all parties interested of the application for the fixing of the fee: Estate of Carpenter, 146 Cal. 661; 80 Pac. Rep. 1072, 1073.

6. **What is no waiver of fee.** The allowance of attorneys' fees, expenses, and for extraordinary services are matters which can only be adjudicated in the probate court in the final or some subsequent account. The mere fact that the executor or administrator made no such claim when filing his previous accounts should not be taken as an absolute waiver. But the reimbursement to which an executor or administrator is entitled, on account of such payments or such services, is a right personal to himself, and one which he may waive; and until it is asserted, either by the administrator, or by his personal representatives, in an account, and upon a petition presented to the probate court, they are not proper subjects of adjudication: Elizalde v. Murphy, 4 Cal. App. 114; 87 Pac. Rep. 245, 246.

7. **Personal liability for.** If the attorney has any claim upon the executor or administrator by reason of any contract for compensation, he must look to the executor or administrator as an individual, and not in his representative capacity; and an action to enforce such a contract would not lie against him in the latter capacity: Sullivan v. Lusk (Cal. App.), 94 Pac. Rep. 91, 92; Estate of Kruger, 143 Cal. 141; 76 Pac. Rep. 891; McKee v. Soher, 138 Cal. 367, 370; 71 Pac. Rep. 43b, 649; Briggs v. Breen, 123 Cal. 657, 659; 56 Pac. Rep. 633, 886; Estate of Ogier, 101 Cal. 381, 385; 40 Am. St. Rep. 61; 35 Pac. Rep. 900; Hunt v. Maldonado, 89 Cal. 636; 27 Pac. Rep. 56; Estate of Scott, 1 Cal. App. 740, 746; 83 Pac. Rep. 85. An executor or administrator is usually, as a matter of fact, protected against any personal responsibility by the agreement of the attorney that he will accept the amount allowed by the court in full compensation for his services, but this is a matter entirely between the attorney and the executor or administrator, and in no way affects the probate proceeding. The effect of such an agreement, so far as the attorney is concerned, is precisely the same as if the attorney and executor had agreed that the amount to be paid to the attorney by the executor should be fixed by some third party. It may be, where such an agreement is made,

that the executor or administrator would be legally bound to submit to the court an application for the allowance of counsel fees, and would be personally answerable to his attorney for the reasonable value of the services, if he failed to do so, but the probate court has sole and exclusive jurisdiction of the question as to the amount that shall be allowed to the executor or administrator for legal expenses from the funds of the estate: *Estate of Kruger*, 145 Cal. 141, 145; 76 Pac. Rep. 891. The testator's selection, in his will, of an attorney is not binding on his executor, but is simply an advisory provision, which he may disregard if he chooses to do so. The reason for this is, that, if the attorney employed should be derelict in his duty, and should receive and misappropriate funds of the estate, the executor would be liable therefor to the legatees under the will; and this being so, it would not be reasonable or right to hold that the executor of a will must necessarily accept the services of an attorney selected by the testator: *Estate of Ogier*, 101 Cal. 381, 385; 40 Am. St. Rep. 61; 35 Pac. Rep. 900. If there is no agreement that the attorneys shall look for their fees to the estate, or an allowance therefrom by the court, it follows that the executors or administrators are answerable personally to them for their reasonable compensation: *Briggs v. Breen*, 123 Cal. 657, 659; 56 Pac. Rep. 633, 886. The determination of the court, in allowing an attorney's fee, is not a determination of the character of the contract made by the executor and attorney as to the amount of the fee the attorney is to be paid for his services. Upon the contrary, it is simply a determination as to the amount of the fee that the estate should be held to pay. If the executor or administrator agreed to pay an amount in excess of that sum, then such excess becomes purely a personal matter between the contracting parties; but if, by special contract with the executor or administrator, the attorney has agreed to perform the services for a specified sum, which is less than the court might deem the services worth to the estate, then another question will be presented. In any event, if, by the contract of the parties, the fee is to be fixed by the court, according to the value of the services rendered, such an agreement is, in effect, a personal release of the executor or administrator from any personal liability whatever for an attorney's fee: *Estate of Kasson*, 119 Cal. 489, 491; 51 Pac. Rep. 706. An executor or administrator may make himself personally liable for an attorney's fee, but he can not be permitted to charge the same back to the estate: *In re Davis' Estate*, 31 Mont. 421; 78 Pac. Rep. 704, 705. The employment of counsel for the administrator, and payment for the services of such counsel, is a matter of personal and private agreement between the executor or administrator and counsel, to be reported to the court as any other expense in due course of administration for the allowance or disallowance of the court. Hence if the administrator refuses to pay a sum claimed for attorneys' fees, or any other sum, and has not

contracted with counsel to abide by any finding of the court as to the amount, if any, to be paid counsel, the court has no power to order the executor or administrator to include any sum of money in his accounts as due to such counsel, or to segregate or to set aside any sum from the funds of the estate for the use of counsel, and to order the executor or administrator to amend his final account as including such an allowance therein: *State v. Second Jud. Dist. Court*, 25 Mont. 33; 63 Pac. Rep. 717, 718. The estate of a decedent is not primarily liable for legal services rendered for the benefit of such estate at the request of the personal representative. Such services are performed for and on behalf of the executor or administrator, who is personally liable for the payment thereof, and for all such reasonable expenditures he is entitled to reimbursement from the estate: *Besancon v. Wegner* (N. D.), 112 N. W. Rep. 965.

REFERENCES.

Personal liability for attorneys' fees: See also head-line 4, ante.

8. **What may properly be allowed.** An executor or administrator, acting in good faith, is entitled to the aid of counsel in all litigation touching the estate, and to be allowed, in his account, the reasonable compensation paid such counsel: *Estate of Miner*, 46 Cal. 564, 572. It is his right, and ordinarily his duty, to employ competent counsel to aid him in the management of adversary suits in which the estate may be involved while under his care, and fees for such services may be allowed to him from the assets of the estate: *Estate of Simmons*, 43 Cal. 543, 548. An executor or administrator is entitled to a reasonable compensation for attorneys' fees in any necessary litigation or matter requiring legal advice or counsel. It is the duty of an executor to keep and render a just account of his trust, and, if he thinks proper, to keep a clerk for that purpose, but he must do it at his own expense. His claim for attorneys' fees should ordinarily be presented in an itemized form, and not for an aggregate amount by the year, but, under peculiar circumstances, this rule will not be enforced: *Steele v. Holladay*, 20 Or. 462; 26 Pac. Rep. 562, 564. It is proper for the court to allow an attorney's fee paid by the administrator in defending a suit brought against the decedent in his lifetime to foreclose the lien of a street assessment, where such defense was successful: *Estate of Heeney*, 3 Cal. App. 548, 553; 86 Pac. Rep. 842. The executor or administrator should also be allowed a reasonable sum on account of an attorney's fee incurred by him on appeal from an order of the probate court settling his account, where he obtains a reversal of the order: *Estate of Moore*, 96 Cal. 522, 531; 32 Pac. Rep. 584. He is also entitled to the allowance of an attorney's fee for the services and traveling expenses of his attorney, not exceeding a reasonable compensation for the labor actually performed, when the same

was necessary to enable him to properly perform the duties of his trust; *Estate of Moore*, 72 Cal. 335, 342; 13 Pac. Rep. 880; *Estate of Rose*, 80 Cal. 166; 122 Pac. Rep. 86. An attorney, appointed to defend an action upon a claim presented against the estate by an executor, is also entitled to fees for his services rendered in the supreme court on appeal from a judgment against the claimant: *Painter v. Estate of Painter*, 78 Cal. 625, 627; 21 Pac. Rep. 433. If an executor or administrator pays an attorney's fee without prior order of the court, he takes chances upon the ultimate disapproval, if the court should not agree with him respecting the justness of the account paid. But where the account, as presented, is reasonable in sum, and calculated on a just basis, it should be allowed as filed, though the claim is for a contingent fee. An executor or administrator is entitled to proper credits in his account for all disbursements made in good faith on behalf of the estate, in the course of administration, whether they concern its necessary expenses, or what may be laid out in recovering assets. And this rule extends so far as to justify the representative in making contracts with counsel for fees, contingent on the recovery of assets, and therefore estimated at a larger figure than would be proper, where the compensation was certain, and dependent on a contract which was enforceable in any event as against the representative: *Filbeck v. Davies*, 8 Col. App. 320; 46 Pac. Rep. 214. No fee should be allowed to the attorney of an executor or administrator for traveling expenses in attending the hearing of a contest of letters of administration: *Estate of Byrne*, 122 Cal. 260, 261; 54 Pac. Rep. 957; but the proper traveling expenses of an attorney employed by the administrator to take an appeal from what was deemed an erroneous order of sale of real estate, such expenses being incurred to enable him intelligently and properly to prosecute the claim, should be allowed, in addition to his fees in the settlement of accounts of the administrator: *Estate of Byrne*, 122 Cal. 260, 267; 54 Pac. Rep. 957.

9. What cannot be allowed. While the probate court has sole and exclusive jurisdiction to determine what amount shall be allowed to the executor or administrator for the amount of services rendered by him through an attorney, it cannot adjudicate questions between him and the attorney: *Estate of Kruger*, 143 Cal. 141, 147; 76 Pac. Rep. 891. Executors, administrators, receivers, and trustees are, in their official capacity, indifferent persons, as between the real parties in interest. They are appointed by the court, or by will, and act on behalf of all the parties who claim any interest in the estate. They cannot, therefore, litigate the claims of one heir against those of another, and they have no concern in the question as to who shall bear the costs of the litigation: *Goldfield v. Thompson*, 83 Cal. 420, 422; 23 Pac. Rep. 383. If the executors or administrators attempt to create a charge against the estate, under a contract with the heir for a

greater compensation for the payment of an attorney's fee than that previously fixed by the court, such contract is void, and no extra allowance should be made; *Firebaugh v. Burbank*, 121 Cal. 186, 191; 53 Pac. Rep. 560. Parties interested in an estate have the right to show that the services of an attorney have been so negligently performed as to cause damage to the estate, and consequently that the estate should not pay therefor: *Estate of Kruger*, 143 Cal. 141, 147; 76 Pac. Rep. 891; 130 Cal. 621; 63 Pac. Rep. 31. No fee should be allowed to an attorney for services in contesting the probate of a will on behalf of the administrator: *Estate of Parsons*, 65 Cal. 240; 3 Pac. Rep. 817. On the successful contest of the probate of a will, the court has discretionary power to order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require; but, as attorneys' fees are not costs, the court has no power to make such fees payable out of assets of the estate: *Estate of Olmstead*, 120 Cal. 447, 453; 52 Pac. Rep. 804. Until a will has been admitted to probate, the court has no power to appropriate the funds of the estate, to aid either the proponents or contestants; but, after a will has been admitted to probate, and executors appointed, it is undoubtedly their duty to defend and to uphold the will, and attorneys employed for such purposes are clearly entitled to a reasonable compensation for their services: *Estate of McKinney*, 112 Cal. 447, 454; 44 Pac. Rep. 743. Unless the statute permits the court to allow to an administrator not only a certain percentage for commissions, but also such other sum as the court may deem reasonable for extra trouble, no additional allowance for costs and charges in collecting and defending claims against the estate can be made to an administrator, who is also a lawyer, for legal services rendered to the estate: *Doss v. Stevens*, 13 Col. App. 535; 59 Pac. Rep. 67, 70. An administrator, who is also a lawyer, is required to exercise his professional skill and to conduct the business of the estate himself, unless there is a necessity shown for the employment of legal assistance; and he should be required to do so without extra compensation, where it is just an ordinary administration with no legal or other complication: *Noble v. Whitten*, 38 Wash. 262; 80 Pac. Rep. 451, 454. An executor or administrator should not be allowed an attorney's fee concerning matters with which he, as executor or administrator, had nothing to do, as in the matter of procuring the removal of the guardian of minor heirs: *Estate of Rose*, 80 Cal. 166, 179; 22 Pac. Rep. 86. He is not entitled to an allowance for fees paid to an attorney for his services in resisting the claims of a pretermitted heir: *Estate of Jessup*, 80 Cal. 625; 22 Pac. Rep. 260. No attorneys' fee should be allowed for services which were rendered for another estate, and which were paid for: *In re Mason's Estate*, 26 Wash. 259; 66 Pac. Rep. 435, 436. Where counsel have been retained to protect the estate, and no exigency is presented requiring additional counsel, it is wrong for the court to allow

anything further in that behalf. While an executor or administrator is allowed counsel, not only to advise him in the management of the affairs of his trust, but also for conducting such litigation as may necessarily arise from time to time, the assets of the estate are not for him to expend as he chooses, or to further his own ends. He must be guided by prudence and the requirements of the estate. It is within the discretion of the court to reimburse him for necessary expenses in this behalf. But the burden is upon him to show that they have been rendered necessary by the requirements of the estate; and if he fails to sustain this burden, the court should disallow any such charge: *In re Davis' Estate*, 33 Mont. 539; 88 Pac. Rep. 957, 959. No allowance should be made to an executor or administrator for the services of an attorney employed to do work including services for which the executor or administrator receives a commission. Such services should be paid for by the executor or administrator himself: *Estate of Brignole*, 133 Cal. 162, 164; 65 Pac. Rep. 294; *Estate of Moore*, 72 Cal. 335, 342; 13 Pac. Rep. 880. In an action by an administrator for damages for the death of his decedent, his duties as assistant district attorney are within the scope of his duties as administrator, and he cannot make a contract with his attorneys for additional compensation as assistant attorney in the case: *In re Evans*, 22 Utah, 366; 62 Pac. Rep. 913.

10. Reasonableness of fee. The question as to what shall be allowed to the executor or administrator from the estate for legal services, as well as all other necessary expenses, is one solely between such executor or administrator on the one side, and those entitled to succeed to the residue of the estate, after the payment of the expense of administration, on the other side: *Estate of Kruger*, 143 Cal. 141, 144; 76 Pac. Rep. 891. The court must determine whether a fee charged is a reasonable sum to be charged to the estate on account of legal services rendered to it: *Estate of Brignole*, 133 Cal. 162, 164; 65 Pac. Rep. 294. The administrator's allowance of a claim for an attorney's fee does not make out a prima facie case in favor of its validity, if objected to on the final account, but the claimant must substantiate the reasonableness of the several charges by proof thereof: *In re Miller's Estate*, 40 Or. 424, sub nom. *Knight v. Hamaker*, 67 Pac. Rep. 107, 1010; as to the reasonableness of an attorney's fee under varying circumstances, see *In re McCullough's Estate*, 31 Or. 36, sub nom. *Muldrick v. Galbraith*, 49 Pac. Rep. 886; *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521; *In re Davis' Estate*, 31 Mont. 421; 78 Pac. Rep. 704; *In re Sullivan's Estate*, 36 Wash. 217; 78 Pac. Rep. 945.

11. Co-executors and special administrators. If the court allows an aggregate sum to be drawn from court by three executors to pay

attorneys' fees, without direction as to apportionment between the attorneys employed by two of them and an attorney employed by the third, it has power, upon the settlement of the final account, to deduct an allowance from the amount paid to the former, and to increase the allowance made to the executors for the latter. The court has no power to fix the attorneys' fees and to apportion the money between the attorneys, but it does have power to allow the executors represented by two of the attorneys a designated sum as attorneys' fees, and the other executor, represented by another attorney, a stated sum incurred as an attorney's fee: *Estate of Scott*, 1 Cal. App. 740, 746; 83 Pac. Rep. 85; but see *Estate of Dudley*, 123 Cal. 256; 55 Pac. Rep. 897. Where there are several executors or administrators, the act of the majority cannot deprive one of the executors or administrators of the assistance or advice of counsel. If there are three executors, it is true that the estate may be put to more expense for attorneys' fees, but that was for the deceased to consider in making his will. Certainly a testator who appoints three friends, in whose judgment and integrity he confides, does not intend that one of them shall be ignored and not allowed expenses which are allowed to the others: *Estate of Scott*, 1 Cal. App. 740, 748; 83 Pac. Rep. 85. The court has no power to authorize a special administrator to defray the expenses of a controversy over the probate of a will, unless expressly authorized to do so by the statute. Conceding that counsel fees for services rendered the executor or administrator in probating the will may be regarded as "costs," they cannot be allowed, except as an incident to some judgment or order of the court. The probate judge is clothed with discretion to order costs to be paid by any party to the proceeding, or out of the assets of the estate, as justice may require; but this discretion cannot be exercised until there is something upon which it may be based: *Henry v. Superior Court*, 93 Cal. 569, 571; 29 Pac. Rep. 230. An allowance may be made to an attorney of an executor and special administrator out of the assets of the estate for compensation on account of extraordinary services rendered by a person as such attorney: *Estate of Riviere* (Cal. App.), 96 Pac. Rep. 16, 17.

12. Recovery of fee. No action can be maintained against the estate of a deceased person by an attorney for legal services rendered by him for the benefit of the estate at the request of the personal representative: *Besancon v. Wegner* (N. D.), 112 N. W. Rep. 965. If the attorney has any claim upon the executor or administrator by reason of any contract for compensation, he must look to the executor or administrator as an individual, and not in his representative capacity; and an action to enforce such a contract would not lie against him in the latter capacity: *Sullivan v. Lusk* (Cal. App.), 94 Pac. Rep. 91, 92. An executor or administrator is personally answerable to his attorney for the reasonable value of the latter's services,

regardless of the amount allowed by the probate court. It follows, therefore, that an allowance made to him for attorneys' fees is not conclusive on the attorneys: *Estate of Scott*, 1 Cal. App. 740; 83 Pac. Rep. 85; and an adjudication by the court as to the amount which an attorney should receive as an attorney's fee cannot be pleaded in bar of any right of action which the attorney may have on any contract made by him with the executor or administrator as an individual: *Sullivan v. Lusk* (Cal. App.), 94 Pac. Rep. 91, 92. If the agreement was that the attorney should receive from the executor or administrator a certain specified sum for his services, the executor or administrator would be personally answerable for that sum, regardless of what the court in probate might allow the executor or administrator; and if the agreement was simply that the attorney should receive from the executor or administrator what his services were reasonably worth, he could recover from the executor, by personal action against him, the sum adjudged therein to be the reasonable value of his services, regardless of the adjudication of the court in probate as to what constituted such reasonable value: *Estate of Kruger*, 143 Cal. 141, 146; 76 Pac. Rep. 891; *Briggs v. Breen*, 123 Cal. 657; 56 Pac. Rep. 633, 886. In an action to recover the reasonable value of services rendered to co-executors jointly by an attorney, an executor may be joined with the administrator of a deceased executor, but the recovery of the latter is limited to payment in due course of administration: *Briggs v. Breen*, 123 Cal. 657, 662; 56 Pac. Rep. 633, 886. If each of two administrators have severally employed attorneys, and the powers of one of them is suspended after the settlement of his accounts, and the fees of an attorney had been paid by the administrator who employed him, such fee cannot be again recovered, although it had been fixed in the decree settling the final account. Credit, in the account, for the sum so allowed does not constitute a judgment or adjudication in favor of the attorney against either the estate or the executor, and cannot be made the foundation of an action by him against either. The decree only fixes the allowance of an attorney's fee as an expense of administration, and it could be allowed in the decree after it was paid as well as before: *McKee v. Soher*, 138 Cal. 367, 371; 71 Pac. Rep. 438, 649. There is a distinction between a bill of particulars for an attorney's services, and bills of particulars of accounts generally, and where the statement, as rendered by an attorney, informs the defendant fully of the character of the services, the manner in which they were rendered, the transaction out of which the services arose, and the aggregate value of the whole, nothing more should be required. He should not be held to that degree of strictness which would be necessary in a statement of merchandise sold and delivered. Where the retainer is general, and the attorney advises his client, or performs services in a number of distinct matters, he may properly be required to set out his charge for each separate matter; but, when the services

all relate to one subject, it forms no just measure of the services to separate the services into parts, and to have the attorney state what charge he makes for each separate part. The only correct method is to view the service as a whole, since, by no other method, can one of its most important elements, namely, the result of the service to the client, be taken into account in estimating the value of the services: *Moore v. Scharnikow* (Wash.), 94 Pac. Rep. 117, 120. Upon an application to the court to fix the amount of compensation for the services of an attorney for the executor or administrator, the court has power to do full and complete justice between the parties, and to consider any damage that may have been occasioned by the negligence of the attorney in the conduct of litigation on behalf of the estate: *Estate of Kruger*, 123 Cal. 391; 55 Pac. Rep. 1056. In an action in equity for an accounting against the executor of a deceased administrator the court may, where it has jurisdiction both in equity and in matters of probate, determine the amount due the attorney of the deceased administrator: *Pennie v. Roach*, 94 Cal. 515, 521; 29 Pac. Rep. 956; 30 Pac. Rep. 106.

13. Recovery of more than amount allowed. Although the court allows the executor or administrator an amount which it deems reasonable for the fees of his attorney, such allowance, in the absence of agreement, is not binding upon the attorney, and he may recover more than the amount allowed, provided the allowance was not reasonable: *McKee v. Soher*, 138 Cal. 367, 370; 71 Pac. Rep. 438, 649; *Estate of Scott*, 1 Cal. App. 740, 747; 83 Pac. Rep. 85.

14. Appeal. An order allowing an attorney's fee to the attorney of an executor or administrator is an appealable order: *Estate of Kruger*, 123 Cal. 391, 392; 55 Pac. Rep. 1056. The order made upon an application by an attorney for compensation on account of extraordinary services rendered by him is an appealable order: *Estate of Riviere* (Cal. App.), 96 Pac. Rep. 16, 17. The order directing the administrator of an estate to pay the demand of an attorney for services rendered to the administrator during the progress of the settlement of the estate, while not technically a "claim" against the estate, is appealable: *Stuttmeister v. Superior Court*, 72 Cal. 487; 14 Pac. Rep. 35. Any person interested in the estate of a decedent has the right to appeal from an order allowing, out of the assets of the estate, compensation to an attorney on account of extraordinary services rendered by him for the benefit of the estate: *Estate of Riviere* (Cal. App.), 96 Pac. Rep. 16, 17. The discretion of the court below in allowing an attorney's fee to an executor or administrator of an estate will not be disturbed on appeal, in the absence of any showing that such discretion has been abused; as, where the allowance made is less than the estimate of any expert witness who testified, and was consented to by the

attorney for the sole heir interested in the estate: *Freese v. Pennie*, 110 Cal. 467, 470; 42 Pac. Rep. 978; *Estate of Adams*, 131 Cal. 415; 63 Pac. Rep. 838; or where there is conflicting evidence as to the value of the services rendered to the estate by the attorneys and the amount allowed by the court finds support in the evidence: *In re Levinson*, 108 Cal. 450, 457; 41 Pac. Rep. 483; 42 Pac. Rep. 479; or where the court has exercised a discretion in apportioning the allowance of counsel fees between joint administrators: *Estate of Dudley*, 123 Cal. 256, 257; 55 Pac. Rep. 897. The amount fixed by the court as counsel fees for an executor or administrator will not be disturbed, where no abuse of discretion is shown: *Estate of Gasq.*, 42 Cal. 288, 290. Upon the reversal of an order appointing an administrator, such person is not entitled to the payment of an attorney's fee and costs expended by him in making the contest: *Estate of Barton*, 55 Cal. 87, 90. As the court has no jurisdiction of an appeal taken by an attorney from a decree settling the executor's final account, such appeal will be dismissed: *Estate of Kruger*, 143 Cal. 141, 147; 76 Pac. Rep. 891. So trustees appointed under a will, who have sued to obtain, for their direction, a construction of certain clauses therein, are not aggrieved by an order allowing the attorney and guardian ad litem for the minor heirs a fee for his services, to be paid by the trustees out of the estate, and their appeal from such order will be dismissed: *Goldtree v. Thompson*, 83 Cal. 420, 422; 23 Pac. Rep. 383. Where the evidence is not set forth in the record upon appeal, error in the allowance of an attorney's fee is not to be presumed, and, in the absence of evidence, the court cannot say that the lower court erred in refusing to allow the expenditure as a charge against the estate: *Estate of Scott*, 1 Cal. App. 740, 743; 83 Pac. Rep. 85. It is harmless error for the judgment allowing an attorney's fee to direct that the administrator pay out of the estate to the defendant in the action "for the use and benefit of an attorney," or to "said attorney in person," as payment is not required to be made to the attorney in person. Any invalidity or error in specifying such alternative in the judgment may therefore be disregarded: *Pennie v. Roach*, 94 Cal. 51b, 519; 29 Pac. Rep. 956; 30 Pac. Rep. 106. Where a case has been appealed by an administrator, his commissions definitely fixed, and the case remanded, the judge below is not authorized to allow a fee to the attorney for the legatees, and to make the same a charge against the administrator's commissions: *Estate of Alina*, 13 Haw. 630, 631.

CHAPTER II.

ACCOUNTING AND SETTLEMENTS BY EXECUTORS AND ADMINISTRATORS.

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- § 682. Form. Notice of settlement of final account and distribution.
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- § 684. Form. Order settling final account and for distribution.

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- § 686. Form. Order settling final account, report, and petition for distribution under will.
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- § 688. Form. Exceptions to account.
- § 689. Contest by heirs. Hearing. Referee.
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- § 697. Presentation of account. Death of representative.

ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS.

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| <ul style="list-style-type: none"> 1. In general. 2. Duty to account. 3. Notice of settlement. 4. Account must show what. 5. Order for payment of dividend. 6. Vouchers. 7. Hearing. <ul style="list-style-type: none"> (1) In general. (2) Matters not to be considered. 8. Exceptions. Contest. Objections. Evidence. <ul style="list-style-type: none"> (1) In general. (2) Exceptions as aid to court. (3) Right to appear and contest. (4) Contest of allowed claim. (5) Manner of stating objections. Facts. (6) Purpose of statute. Practice. Pleadings. Issues. (7) Additional or amended exceptions. (8) Untenable objections. (9) Evidence. Burden of proof. Presumptions. (10) Waiver of written objections. 9. Power and duty of court. <ul style="list-style-type: none"> (1) In general. (2) As to notice. (3) To scrutinize accounts. (4) In absence of exceptions. (5) Report of referee. (6) To compel accounting. (7) Striking. Combining. Making more specific. | <ul style="list-style-type: none"> (8) Want of jurisdiction. 10. Administrator to be charged with what. In general. 11. Administrator not chargeable when. 12. Administrator is entitled to credit for what. <ul style="list-style-type: none"> (1) In general. (2) Payments made for preservation or protection of estate. (3) Same. Necessary expenditures. (4) For costs paid. (5) Funeral expenses. Last illness. (6) Payment of family allowance. (7) Traveling expenses. (8) Items for less than twenty dollars. 13. Administrator is not entitled to credit when. <ul style="list-style-type: none"> (1) In general. (2) Improper charges. (3) Unnecessary expenditures. (4) Expenses before administration. (5) Repairs. Protection of estate. 14. Final and intermediate accounts. Waiver. 15. Failure to settle. 16. Death or absconding before accounting. 17. Insolvent administrators. 18. Trial by jury. |
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| 19. Validity of settlement. | 23. Appeal. |
| 20. Effect of settlement. | (1) In general. |
| 21. Conclusiveness of settlement. | (2) Appealable orders. |
| (1) In general. | (3) Non-appealable orders. |
| (2) Items included. Items omitted. | (4) Parties. Representative. |
| 22. Vacating account. Collateral attack. Relief in equity. | (5) Notice. |
| (1) In general. | (6) Findings. Bill of exceptions. Record. |
| (2) Void decree, only, may be vacated. | (7) Sufficiency of judge's certificate. |
| (3) Cannot be set aside for "mistake," etc., when. | (8) Consideration of case. Review. |
| (4) Collateral attack. | (9) Affirmance. Remanding. Reversal. Dismissal. Remittitur. |
| (5) Equitable relief. In general. | |
| (6) Equitable relief for fraud or mistake. | |

§ 656. **To render an exhibit.** When required by the court, either upon its own motion or upon the application of any person interested in the estate, the executor or administrator must render an exhibit under oath, showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants, and all other matters necessary to show the condition of its affairs. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 502), § 1622.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1854.

Colorado. 3 Mills's Ann. Stats., sec. 4796.

Idaho. Code Civ. Proc. 1901, sec. 4242.

Montana. Code Civ. Proc., sec. 2780.

New Mexico. Comp. Laws 1897, sec. 2005.

North Dakota. Rev. Codes 1905, § 8185.

Oklahoma. Rev. Stats. 1903, sec. 1720.

South Dakota. Probate Code 1904, § 272.

Utah. Rev. Stats. 1898, sec. 3941.

Washington. Pierce's Code, § 2637.

§ 657. Form. Exhibit for information of court.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the _____² Court of the County³ of _____,
State of _____.

_____, administrator⁴ of the estate of _____, deceased, renders the following exhibit for the information of the court.

[Give items, with date, from whom received, source from which the money comes, and amount of each item, with the total amount.]

[Give items, with date, to whom paid, and amount of each item, with the total amount.]

Balance in hands of administrator,⁷ \$_____.

Amount of Claims, and Names of Claimants.

The following are the names of those who presented claims against the estate, and the amount of their demands: —.

The following claims have been presented, but not yet allowed: ——. All other claims have been approved and filed.

State all other matters necessary to show the condition of the affairs of the estate. _____, Administrator.⁸

_____, Attorney for Administrator.⁹

Verification of Exhibit.

State of _____,
County ¹⁰ of _____, } ss.

_____, administrator¹¹ of the estate of _____, deceased, being duly sworn, says that he has read the foregoing exhibit, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters he believes it to be true. _____, Administrator.¹²

Subscribed and sworn to before me this ____ day of
____, 19____. _____, Notary Public, etc.¹⁸

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4-9. Or, executor. 10. Or, City and County. 11, 12. Or, executor, etc. 13. Or other officer taking the oath.

§ 658. Form. Petition for order to render exhibit.

[Title of court.]

[Title of estate.] { No. _____¹ Dept. No. _____
[Title of form.] }

To the Honorable the _____² Court of the County³ of _____,⁴
State of _____.

Your petitioner respectfully represents:

That he is a creditor of said estate, and that his claim of _____ dollars (\$_____) has been duly presented, allowed, approved, and filed in this court, but has never been paid;

That — was duly appointed administrator of said estate⁵ on the — day of —, 19—, immediately qualified as such, and entered upon the duties of his trust, but that since said appointment was made said administrator⁶ has not rendered, for the information of this court, any exhibit showing the condition of the affairs of said estate.

Wherefore petitioner prays that this court make an order requiring the said administrator' to appear and render an exhibit, under oath, showing the amount of money received and expended by him, and all other matters necessary to show the condition of the affairs of said estate.

_____, Attorney for Petitioner. _____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, the petition may be addressed to the judge. 5. Or, that _____ was duly appointed executor of the last will of _____, deceased. 6, 7. Or, executor.

§ 659. Form. Order requiring administrator to render exhibit.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
 [Title of form.]

It being shown to the court² from the petition of —, now on file herein, that —, the administrator of said estate, appointed on the — day of —, 19—,³ has failed to render an exhibit for the information of the court; and the court being satisfied from the testimony of —, a witness produced and sworn, that the facts alleged in said petition are true and that good cause exists therefor, —

It is ordered, That —, the administrator⁴ of said estate, be, and he is hereby, required to appear before this court, at the court-room thereof, at —,⁵ on the — day of —, 19—, at the hour of — o'clock in the forenoon⁶ of said day, and render such exhibit; and that a copy of

this order be served on said administrator ' at least five ' days before said ____ day of ____, 19__.

Dated ____, 19__. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, to the judge thereof. 3, 4. Or, executor. 5. State location. 6. Or, afternoon. 7. Or, executor. 8. Or other time, as the court may direct.

§ 660. Objections to account. Revocation of letters. When an exhibit is rendered by an executor or administrator, any person interested may appear and, by objections in writing, contest any account or statement therein contained. The court may examine the executor or administrator, and if he has been guilty of neglect, or has wasted, embezzled, or mis-managed the estate, his letters must be revoked. **Kerr's Cyc. Code Civ. Proc., § 1626.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.* Rev. Stats. 1901, par. 1858.
- Idaho.* Code Civ. Proc. 1901, sec. 4246.
- Montana.* Code Civ. Proc., sec. 2784.
- North Dakota.* Rev. Codes 1905, § 8189.
- Oklahoma.* Rev. Stats. 1903, sec. 1724.
- South Dakota.* Probate Code 1904, § 276.
- Washington.* Pierce's Code, § 2641.
- Wyoming.* Rev. Stats. 1899, sec. 4716.

§ 661. Attachment for not obeying citation. If any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him and such exhibit enforced, or his letters may be revoked, in the discretion of the court. **Kerr's Cyc. Code Civ. Proc., § 1627.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.* Rev. Stats. 1901, par. 1859.
- Idaho.* Code Civ. Proc. 1901, sec. 4247.
- Montana.* Code Civ. Proc., sec. 2785.
- New Mexico. Comp. Laws 1897, sec. 2006.
- North Dakota.* Rev. Codes 1905, § 8190.
- Oklahoma.* Rev. Stats. 1903, sec. 1725.
- South Dakota.* Probate Code 1904, § 277.
- Washington. Pierce's Code, § 2642.
- Wyoming.* Rev. Stats. 1899, sec. 4717.

§ 662. Accounting within thirty days after time for notice to creditors has expired. Within thirty days after the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, every executor or administrator must render a full account and report of his administration. If he fails to present his account the court or judge must compel the rendering of the account by attachments, and any person interested in the estate may apply for and obtain an attachment; but no attachment must issue unless a citation has been first issued, served and returned, requiring the executor or administrator to appear and show cause why an attachment should not issue. Every account must exhibit all debts which have been presented and allowed during the period embraced in the account. **Kerr's Cyc. Code Civ. Proc., § 1628.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, secs. 859, 860, p. 322.
- Arizona.*** Rev. Stats. 1901, par. 1860.
- Colorado.** 3 Mills's Ann. Stats., secs. 4796, 4808.
- Idaho.*** Code Civ. Proc. 1901, sec. 4248.
- Kansas.** Gen. Stats. 1905, §§ 3023, 3025.
- Montana.*** Code Civ. Proc., sec. 2786.
- Nevada.** Comp. Laws, secs. 2970, 2972.
- North Dakota.** Rev. Codes 1905, § 8191.
- Oklahoma.** Rev. Stats. 1903, sec. 1726.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., §§ 1199, 1200.
- South Dakota.** Probate Code 1904, § 278.
- Utah.** Rev. Stats. 1898, sec. 3941.
- Washington.** Pierce's Code, §§ 2478, 2643.
- Wyoming.*** Rev. Stats. 1899, sec. 4718.

§ 663. Form. Account current and report of executor or administrator.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.] }

____, as administrator ² of the estate of _____, deceased, renders to the court his first account current and report of his administration of said estate up to and including the ____ day of _____, 19____, as follows, to wit: ³

Letters of ———⁴ upon said estate were duly issued to him on the ——— day of ———, 19—.

Notice to creditors has been duly published, the first publication thereof being on ———, 19—.

An inventory and appraisement of said estate was returned and filed on the ——— day of ———, 19—, showing the total value of said estate to be the sum of ——— dollars (\$——).

The following is a statement of the claims presented and allowed against said estate, to wit:

Name of Claimant.	Amount of Claim.	Class of Claim. ⁵
_____	_____	_____
_____	_____	_____

Said administrator⁶ is chargeable as follows:

Amount of inventory and appraisement⁷.....\$——

Gain on sales over appraisement:⁸

Parcel 1. Appraised at ——— dollars (\$——);
sold for ——— dollars (\$——); gain\$——

Parcel 2. Appraised at ——— dollars (\$——);
sold for ——— dollars (\$——); gain⁹..... ———

Interest collected:¹⁰

On note of ———.....\$——

On mortgage of ———..... ———

On mortgage of ———..... ———

Principal collected in excess of appraisement:

On note of ———.....\$——

On mortgage of ———..... ———

On account of ———..... ———

Rents collected:

On Parcel 3,¹¹ from ———.....\$——

Total charges..... \$——

And he is entitled to credit as follows:¹²

Loss on sales less than appraisement:

Parcel 3, appraised at ——— dollars (\$——);
sold for ——— dollars (\$——); loss¹³\$——

Property set apart to family by order¹⁴..... ———

Homestead set apart¹⁵..... ———

Property lost or destroyed:

Parcel 4, lost by decree in case No. —, — v.

Parcel 5, property —, ¹⁶ burned..... —

Cash paid as follows:

On family allowance, voucher No.\$—

To court clerk, —, ¹⁷ fees, voucher No. —

[Insert other cash payments.]¹⁸

Total credits\$—

Balance chargeable to next account..... —

Total\$—

The balance consists of the following items:

Cash on hand\$—

Property on hand ¹⁹..... —

Total \$—

The said — further states to the court: —.²⁰

And said — asks that said account be approved and settled, and that an order be made for the payment of the claims filed as aforesaid, or for such portion thereof as shall be proper out of the cash balance on hand. —

Explanatory notes. 1. Give file number. 2. Or, executor. 3. No elaborate or verbose statement of the several proceedings that precede the filing of the account should be made. The fact that they have occurred, and the date, is all that need be stated in the report. If fuller information is desired by any one, it would, in any event, be necessary to resort to the papers in the case. 4. Or, letters testamentary. 5. State the name of each claimant, the amount of the claim, and whether of the first, second, third, fourth, or fifth class, under the statute which designates the order in which debts are to be paid. 6. Or, executor. 7. Each parcel of property, real or personal, should be consecutively numbered in the left-hand margin of the inventory. Demands should be described and appraised as demands, although they may have been paid after the issuance of letters and before the appraisement. In such a case the inventory should state the date and amount of the payment. The inventory should be made as soon as possible after the letters are issued, and should describe the property as it was at that time. 8. All sales should be briefly stated in the report; but no sales should be mentioned in the statement of the account, unless the price is either above or below the appraised value. The only purpose of mentioning them in the statement of account is to show the gain or loss as compared with the appraisement, which is the standard. 9. Proceed with other parcels

in the same manner. 10. In charging interest collected, care must be taken not to make a double charge. Interest is sometimes included and computed in the appraised value, in which case no additional charge should be made, unless the interest collected exceeds the amount as appraised. So, also, in charging excess of principal, the appraisement is the standard, and not the actual principal of the demand. 11. Proceed with other parcels in the same way. 12. In making out the statement of account, every item as to which there has been a gain or a loss should be mentioned; items as to which there has been no gain or loss should be omitted, as the appraisement, or standard, shows the amount of such items. The court does not want each item of possible loss or gain to be mentioned, with a denial of loss or gain if there be none. This is not required. If the administrator, or executor, is charged with the amount of the inventory and appraisement, with all gains thereon, and is credited with all losses and payments made, letting the other items stand as in the inventory and appraisement, the difference between the debit and credit sides of the account will be the true balance chargeable to the administrator or executor. 13. Proceed with other parcels in the same manner. 14, 15. Give the appraised value. 16. State what was burned. 17. State nature of fees. 18. When there is no voucher for an item, the account must state the date, place of payment, and name of payee. 19. Appraised value. 20. Here give a statement of any further facts necessary to explain any item of the account, or the condition of the estate.

§ 664. Form. Affidavit to account.

State of —, }
County¹ of —, } ss.

—, being duly sworn, on oath says: That he is the administrator² who makes the foregoing account and report, and that all the statements therein made are true; that each item of expenditure therein set forth, to an amount not over twenty dollars, for which no voucher is produced, was actually paid at the time and place and to the person as therein specifically stated; and that the same contains a full and true statement of all charges against him, and of all credits to which he is entitled, on account of said estate, —.

Subscribed and sworn to before me this — day of —, 19—.

Explanatory notes. 1. Or, City and County. 2. Or, executor.

§ 665. Form. Petition for order requiring administrator to render an account.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____⁴,
State of ____.

Your petitioner respectfully represents:

That he is a creditor of said estate, and that his claim of ____ dollars (\$____) has been duly presented, allowed, approved, and filed in this court, but has never been paid;

That ____ was duly appointed administrator of said estate⁵ on the ____ day of ____, 19____, immediately qualified as such, and entered upon the duties of his trust, but that more than thirty⁶ days have elapsed since the expiration of the time mentioned in the notice to creditors within which claims must be exhibited, but that said administrator⁷ has failed to render, as required by law, a full account and report of his administration.

Wherefore petitioner prays that said administrator⁸ be required to render such account and report.

____, Attorney for Petitioner. ____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, the petition may be addressed to the judge. 5. Or, that ____ was duly appointed executor of the last will of ____, deceased. 6. Or other time prescribed by the statute. 7, 8. Or, executor.

§ 666. Form. Order for citation to administrator to render account.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It appearing from the petition of ____, filed herein, and from the papers and records in the above-entitled estate, that ____ was appointed administrator of said estate² on the ____ day of ____, 19____, and thereupon duly qualified as and is now such administrator;³ that more than thirty days have elapsed since the expiration of the time mentioned in the notice to creditors within which claims must be exhibited;

and that said administrator ⁴ has failed to render and present an account and report of his administration as required by law, —

It is ordered, That a citation issue to said —, administrator, ⁵ requiring him to appear before this court, at the court-room thereof at —, ⁶ on —, ⁷ the — day of —, 19—, at — o'clock in the forenoon of said day, then and there to show cause, if any he has, why an attachment should not issue to compel him to render such account and report.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will of said deceased. 3-5. Or, executor. 6. Give location of court-room. 7. Day of week.

§ 667. Form. Order to account on failure to show cause.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

It being shown to the court ² that —, administrator ³ of the estate of —, deceased, has failed to comply with the citation heretofore issued, herein requiring him to show cause why he should not be required to render a full account and report of his administration concerning said estate, —

It is ordered, That the said administrator ⁴ render such account, and report within — ⁵ days from the date hereof; and that a copy of this order be served on said administrator ⁶ within — ⁷ days from the date hereof.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, judge of this court. 3, 4. Or, executor. 5. As fixed by the court. 6. Or, executor. 7. Give reasonable time between day of service and day for filing account.

§ 668. Form. Attachment to compel rendering of account.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

The court, being satisfied ² that —, the administrator ³ of the estate of —, has neglected to render an account

and report of his administration within thirty days after the expiration of the time mentioned in the notice to creditors of said estate, within which claims must be exhibited; and it appearing that a citation has issued, requiring the said administrator⁴ to appear and show cause why an attachment shall not issue to compel him to render said account; that the said — has failed to appear and render such account and report, or to show cause why an attachment should not issue as directed in said citation; and that said citation has been served and returned in manner and form prescribed by law, and as directed by this court,—

It is ordered, That a warrant of attachment issue, and that said — be arrested and brought before this court to show cause why he should not be committed for contempt in disobeying said citation.

Dated —, 19—, —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Either from the oath of the applicant, who seeks to make the administrator or executor account, or from any other testimony offered. 3, 4. Or, executor, etc., according to the fact.

§ 669. Executor to account after his authority is revoked.

When the authority of an executor or administrator ceases, or is revoked for any reason, he may be cited to account before the court, at the instance of the person succeeding to the administration of the same estate, in like manner as he might have been cited by any person interested in the estate during the time he was executor or administrator.
Kerr's Cyc. Code Civ. Proc., § 1629.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1863.

Idaho.* Code Civ. Proc. 1901, sec. 4249.

Montana.* Code Civ. Proc., sec. 2787.

Nevada.* Comp. Laws, sec. 2979.

New Mexico. Laws 1907, sec. 3, p. 157; sec. 4, p. 158.

North Dakota. Rev. Codes 1905, § 8191.

Oklahoma.* Rev. Stats. 1903, sec. 1727.

South Dakota.* Probate Code 1904, § 279.

Washington.* Pierce's Code, § 2644.

Wyoming.* Rev. Stats. 1899, sec. 4719.

§ 670. **Authority of executor to be revoked when.** If the executor or administrator resides out of the county, or absconds, or conceals himself, so that the citation cannot be personally served, and neglects to render an account within thirty days after the time prescribed in this article, or if he neglects to render an account within thirty days after being committed where the attachment has been executed, his letters must be revoked. **Kerr's Cyc. Code Civ. Proc., § 1630.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1864.
Idaho.* Code Civ. Proc. 1901, sec. 4250.
Montana.* Code Civ. Proc., sec. 2788.
Nevada. Comp. Laws, sec. 2980.
North Dakota.* Rev. Codes 1905, § 8192.
Oklahoma.* Rev. Stats. 1903, sec. 1728.
South Dakota.* Probate Code 1904, § 280.
Washington.* Pierce's Code, § 2645.
Wyoming. Rev. Stats. 1899, sec. 4720.

§ 671. **To produce and file vouchers, which must remain in court.** In rendering his account, the executor or administrator must produce and file vouchers for all charges, debts, claims, and expenses which he has paid, which must remain in the court; and he may be examined on oath touching such payments, and also touching any property and effects of the decedent, and the disposition thereof. When any voucher is required for other purposes, it may be withdrawn on leaving a certified copy on file; if a voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness. **Kerr's Cyc. Code Civ. Proc., § 1631.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 859, p. 322.
Arizona.* Rev. Stats. 1901, par. 1865.
Idaho.* Code Civ. Proc. 1901, sec. 4251.
Kansas. Gen. Stats. 1905, § 3032.
Montana.* Code Civ. Proc., sec. 2789.
Nevada. Comp. Laws, sec. 2975.
North Dakota. Rev. Codes 1905, § 8193.

Oklahoma.* Rev. Stats. 1903, sec. 1729.

South Dakota.* Probate Code 1904, § 281.

Utah.* Rev. Stats. 1898, sec. 3943.

Washington. Pierce's Code, § 2646.

Wyoming. Rev. Stats. 1899, sec. 4721.

§ 672. **Vouchers for items less than twenty dollars.** On the settlement of his account he may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment, specifying when, where, and to whom it was made; but such allowances in the whole must not exceed five hundred dollars against any one estate, and if, upon such settlement of accounts, it appear that debts against the deceased have been paid without the affidavit and allowance prescribed by statute or sections one thousand four hundred and ninety-four, one thousand four hundred and ninety-five, and one thousand four hundred and ninety-six of this code, and it shall be proven by competent evidence to the satisfaction of the court that such debts were justly due, were paid in good faith, that the amount paid was the true amount of such indebtedness over and above all payments or set-offs, and that the estate is solvent, it shall be the duty of the said court to allow the said sum so paid in the settlement of said accounts. **Kerr's Cyc. Code Civ. Proc., § 1632.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, pars. 1743, 1866.

Idaho. Code Civ. Proc. 1901, sec. 4252.

Kansas. Gen. Stats. 1905, §§ 2964, 3033.

Montana.* Code Civ. Proc., sec. 2790.

New Mexico. Comp. Laws 1897, sec. 8101.

North Dakota. Rev. Codes 1905, § 8194.

Oklahoma. Rev. Stats. 1903, sec. 1730.

South Dakota. Probate Code 1904, §§ 172, 282.

Utah.* Rev. Stats. 1898, sec. 3944.

Washington. Pierce's Code, § 2647.

§ 673. **Day of settlement. Notice. Hearing.** When any account is rendered for settlement, the clerk of the court

must appoint a day for the settlement thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper. **Kerr's Cyc. Code Civ. Proc.**, § 1633.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 862, p. 322.
Arizona. Rev. Stats. 1901, par. 1867.
Colorado. 3 Mills's Ann. Stats., sec. 4806.
Idaho. Code Civ. Proc. 1901, sec. 4253.
Montana. Code Civ. Proc., sec. 2791.
Nevada. Comp. Laws, sec. 2973.
New Mexico. Laws 1901, sec. 27, p. 155.
North Dakota. Rev. Codes 1905, § 8195.
Oklahoma. Rev. Stats. 1903, sec. 1731.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1202.
South Dakota. Probate Code 1904, § 283.
Utah. Rev. Stats. 1898, sec. 3942.
Washington. Pierce's Code, § 2649.
Wyoming. Rev. Stats. 1899, sec. 4722.

§ 674. Form. Order appointing day of settlement of account.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
 [Title of form.]

____, administrator² of the estate of _____, deceased, having this day filed an account of his administration thereof, —

It is ordered, That _____,³ the ____ day of _____, 19____, at ____ o'clock in the forenoon⁴ of said day, and the court-room of this court at _____,⁵ in the said county⁶ of _____, state of _____, be, and the same are hereby, appointed as the time and place for the settlement of said account; and the clerk of this court is directed to give notice thereof by causing notices to be posted in at least three public places

in said county⁷ and state at least ____⁸ days before the day fixed for such settlement.

Dated ____, 19__, ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Day of week. 4. Or, afternoon. 5. Give location of court-room. 6, 7. Or, city and county. 8. Time as fixed by court.

§ 675. Form. Notice of settlement of account.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Notice is hereby given: That ____, the administrator² of the estate of ____, deceased, has rendered and presented for settlement, and filed in said court, his³ ____⁴ account of his administration of said estate, together with a report thereof, and that ____,⁵ the ____ day of ____, 19__, at ____ o'clock in the forenoon⁶ of said day, at the court-room of said court, at the court-house⁷ in said county⁸ of ____, state of ____, has been fixed by the clerk⁹ as the time and place for the settlement of said account and the hearing of said report, at which time and place any person interested in said estate may appear and file his exceptions, in writing, to said account and contest the same. ____, Clerk.

Dated ____, 19__. By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, administratrix; or, executor, etc. 3. Or, her. 4. State character of account. 5. Day of week. 6. Or, afternoon. 7. Designate its location. 8. Or, city and county. 9. Or, court or judge.

§ 676. When settlement is final, notice must so state. If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice must be given by posting or publication for at least ten days prior to the day of settlement. On the settlement of said account, distribution and partition of the estate to all entitled thereto may be immediately had without further notice or proceedings. **Kerr's Cyc. Code Civ. Proc., § 1634.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 862, p. 322.
Arizona. Rev. Stats. 1901, par. 1868.
Colorado. 3 Mills's Ann. Stats., sec. 4806.
Idaho. Code Civ. Proc. 1901, sec. 4254.
Montana. Code Civ. Proc., sec. 2792.
Nevada. Comp. Laws, secs. 3001, 3003.
New Mexico. Laws 1901, sec. 27, p. 155.
North Dakota. Rev. Codes 1905, § 8196.
Oklahoma. Rev. Stats. 1903, sec. 1732.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1202.
South Dakota. Probate Code 1904, § 284.
Utah. Rev. Stats. 1898, sec. 3945.

§ 677. Form. First and final account, report, and petition for distribution.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 [Title of form.]

____, as administrator² of the estate of _____, deceased, renders to the court his first and final account and report, and presents therewith his petition for distribution of said estate as follows, to wit:

Said administrator³ is chargeable as follows:

Amount of inventory and appraisement.....\$_____

Parcel _____,⁴ appraised at _____ dollars

(\$_____); sold for _____ dollars (\$_____);

gain⁵ _____

Interest collected:

On note of _____⁶.....\$_____

Principal collected in excess of appraisement:

On note of _____⁷.....\$_____

Rents collected:

On Parcel 3, from _____⁸.....\$_____

Total charges \$_____

And he is entitled to credits as follows:

Loss on sales less than appraisement:

Parcel 3, appraised at _____ dollars (\$_____);

sold for _____ dollars (\$_____); loss⁹.....\$_____

Property set apart to family by order, ____¹⁰.. ____

Homestead set apart, ____¹¹..... ____

Parcel 4, lost by decree in case No. __, ____ v.

____¹² ____

Parcel 5, personal property burned ____¹³.... ____

Cash paid out as follows:

On family allowance, voucher No. ____\$ ____

To county clerk, fees, voucher No. ____ ____

To ____, funeral, voucher No. ____ ____

To ____, on claim, voucher No. ____ ____

To ____, legacy, voucher No. ____ ____

Commissions allowed by law on ____ dollars

(\$ ____), the total value of estate administered ____

Attorney's fee agreed on, subject to approval of court ____

[Add other cash payments.]

Total credits \$ ____

Which, when deducted from total charges,
leaves for distribution a balance of..... \$ ____

The said balance consists of the following described property, to wit:

Cash on hand\$ ____

And the following described property, to wit:

____¹⁴ ____

Total \$ ____

Letters of administration¹⁵ were duly issued upon said estate on the ____ day of ____, 19__.

Notice to creditors has been duly published, the first publication thereof having been made on the ____ day of ____, 19__.

An inventory and appraisalment of said estate was duly returned and filed on the ____ day of ____, 19__, showing said estate to be of the value of ____ dollars (\$ ____).

The following claims have been presented and allowed against said estate, to wit:¹⁶

Names of Claimants.	Amount of Claim.	Class. ¹⁷
_____	_____	_____
_____	_____	_____

Said estate is now in condition to be finally settled and distributed.

The following named persons are the next of kin and only heirs at law of said deceased, to wit: _____.

[If there is a will, insert the following:] By the terms of the last will of said deceased duly admitted to probate herein on the _____ day of _____, 19____, the said deceased devised and bequeathed, in the proportions and manner in said will specified, his whole estate to the following-named devisees and legatees:¹⁸

There is a collateral-inheritance tax of _____ dollars (\$____) payable on the legacy to _____, and there is also such a tax on the devise to _____, the value of which for that purpose has not been ascertained.¹⁹

Wherefore said _____ asks that said account be approved, allowed, and settled; that the amount of collateral-inheritance tax to be paid on the legacies and devises²⁰ be determined; and that a decree be made for the distribution of all said estate to the persons entitled thereto, and for all other proper relief.

_____, Administrator²¹ of the Estate of _____, Deceased.

[Add verification.]

Explanatory notes. 1. Give file number. 2, 3. Or, executor. 4. Give number of parcel. 5. Enumerate each parcel on which was any gain, and the amount of gain in the same way. 6. Enumerate each note in the same way. 7. Enumerate each collection in the same way. 8. Show rents collected from each parcel, or from which ones collected. 9. Designate each parcel sold in the same way. 10, 11. Appraised value. 12, 13. And any other parcels or property lost. 14. Here describe all remaining property, and state its appraised value. 15. Or, letters testamentary. 16. If all claims have been paid, omit this, and say: "All claims presented and allowed against said estate have been fully paid, as shown by the foregoing account." 17. Show whether claim is of the first, second, third, fourth, or fifth class. 18. Give names of devisees, etc. 19. Or, there is a collateral inheritance tax due on the shares of _____ and _____, giving names and amount due on each. 20. Or, shares. 21. Or, executor.

Of the general subject of accounts and proper form of petition for distribution, Judge Shaw, of the Superior Court of Los Angeles, now on the supreme bench of California, once said, in substance: The practice of many attorneys in making separate documents of the account, the report, and the petition for distribution, putting each under a separate cover is not to be commended, because it requires much repetition of the same matter. It also adds unnecessary bulk to the package of papers filed, and makes them more inconvenient to examine. Attempts have been made to make a printed blank for such accounts with the items thereof printed therein. It is obvious that such a blank would be worse than useless. Scarcely ever are two accounts alike. In almost every one some of the items in the blank are not called for and should be omitted. No printed blank for accounts is practicable beyond the merest skeleton giving the title of the cause and the verification, and the saving of labor amounts to nothing.

§ 678. Form. Final account, report, and petition for distribution of estate following an account current.

[Title of court.]

[Title of estate.] { No. ____ Dept. No. ____
[Title of form.]

____, as administrator² of the estate of _____, deceased, renders to the court his final account and report for settlement of said estate, and presents therewith his petition for distribution thereof, as follows, to wit:

Said _____ is chargeable as follows:

Balance chargeable on settlement of last account current	\$_____
[Here add any other gains to the estate, as in account current.]	_____
Total charges	\$_____

He is entitled to credits as follows:

Paid _____ on claim, voucher No. _____	\$_____
Paid _____ on claim, voucher No. _____ ³ ...	_____
Commissions allowed by law on _____ dollars (\$_____), the total value of estate administered	_____
Attorneys' fees agreed on, subject to approval of court ⁴	_____
[Add any other credit items.]	
Total credits	\$_____

Which, when deducted from total charges,
leaves for distribution a balance of\$——

The said balance consists of the following
described property, to wit:

Cash on hand\$——

And the following described property, to wit:

.....\$——

Total \$——

Letters of administration⁶ were duly issued upon said estate on the ____ day of ____, 19__.

Notice to creditors has been duly published, the first publication thereof having been made on the ____ day of ____, 19__.

In accordance with the order for the payment of claims hereinbefore made, all claims allowed against said estate have been paid, as shown by the foregoing account, and said estate is now in condition to be finally settled and distributed.

Said deceased left as his next of kin and only heirs at law certain persons, whose names, relationship and residences are as follows, to wit:

Names.	Relationship.	Residences.
_____	_____	_____
_____	_____	_____

[If there is a will duly probated, add the following, or a similar statement of its terms, viz.:]

By the terms of the last will of said deceased, admitted to probate herein, the said estate is disposed of as follows: He bequeaths specific money legacies as follows: To _____, _____ dollars (\$____), etc.⁷ He made specific devises of land as follows: To _____,⁸ etc. And the residue of said estate he devised and bequeathed as follows: _____.⁹

There will be collateral-inheritance taxes payable on the legacy to _____ the sum of _____ dollars (\$____), and on the legacy to _____ the sum of _____ dollars (\$____), and there will also be such taxes to pay on the devise to _____, the value of which for that purpose has not been ascertained.¹⁰

Wherefore said _____ asks that said account be approved, allowed, and settled, and that the amount of collateral-inheritance tax to be paid on the legacies and devises be determined, and that a decree be made for the payment of such taxes and for the distribution of all said estate to the persons entitled thereto, and for all other proper relief.

_____, Administrator ¹¹ of the Estate of _____, Deceased.

[Add verification.]

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Etc., enumerating each payment. 4. This item should be omitted, if no agreement has been made as to the amount of attorney's fee, but the report should show that attorneys' fees have been incurred, and an allowance should be asked therefor. No attorneys' fees can be allowed or fixed by the court, unless they are asked for, in some way, in the account or report: Estate of Kruger, 123 Cal. 391; 55 Pac. Rep. 1056. 5. Describe all the remaining property, and state its appraised value. 6. Or, letters testamentary. 7. Enumerate each legacy. 8. Enumerate each devise, and describe the land, and conditions of each devise. 9. State how, and to whom. 10. If there is no collateral inheritance tax, omit the clause as to collateral inheritance taxes. If there is no will, and there are collateral heirs who must pay a tax, insert a statement of the facts here. 11. Or, executor.

§ 679. Form. Final account, report, and petition for distribution. Insolvent estate.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

_____, as administrator ² of the estate of _____, deceased, renders to the court his first and final account and report, and presents therewith his petition for distribution of said estate as follows, to wit:

Said administrator ³ is chargeable as follows:

Amount of inventory and appraisement\$_____

Parcel _____,⁴ appraised at _____ dollars

(\$_____); sold for _____ dollars (\$_____);

gain ⁵\$_____

Interest collected:

On note of _____⁶\$_____

Principal collected in excess of appraisement:

On note of _____⁷.....\$——
 Rents collected:
 On Parcel 3, from _____⁸.....\$——
 Total charges \$——

And he is entitled to credits as follows:

Loss on sales less than appraisement:

Parcel 3, appraised at _____ dollars (\$——);
 sold for _____ dollars (\$——); loss⁹.....\$——
 Property set apart to family by order¹⁰.....
 Homestead set apart¹¹.....
 Parcel 4, lost by decree in case No. —, — v.
 _____¹².....
 Parcel 5, personal property burned¹³.....

Cash paid out as follows:

On family allowance, voucher No. \$——
 To county clerk, fees, voucher No.
 Commissions allowed by law on _____ dollars
 (\$——), the total value of estate adminis-
 tered
 Attorney's fee agreed on, subject to approval of
 court
 [Add other cash payments.]

Total credits\$——

Which, when deducted from total charges,
 leaves for distribution a balance of..... \$——

The said balance consists of the following de-
 scribed property, to wit:

Cash on hand\$——

Letters of administration¹⁴ were duly issued on said estate
 on the _____ day of _____, 19____.

An inventory and appraisement of said estate was duly
 returned and filed on the _____ day of _____, 19____, showing
 the value of said estate to be _____ dollars (\$——).

The following statement gives the name of each creditor
 whose claim has been presented and allowed against said
 estate, the amount now due on his claim, and the class to
 which the same belongs, to wit:

Names of Claimants.	Amount of Claims.	Claims.
_____	_____	_____
_____	_____	_____

The names, degree of kin, and residence of the only heirs at law of said deceased are as follows, to wit: _____ and _____, etc.¹⁵

All the assets of said estate have been reduced to cash, and the estate is now in condition to be finally settled.

Wherefore the said _____ asks that said account be approved and settled; that the court direct the apportionment of said balance among the said creditors, and order payment accordingly; and that the administration be closed; and for all other proper relief.

_____, Administrator of the Estate of _____, Deceased.

[Add verification.]

Explanatory notes. 1. Give file number. 2, 3. Or, executor. 4. Give number of parcel. 5. Enumerate each parcel on which was any gain, and the amount of gain in the same way. 6. Enumerate each note in the same way. 7. Enumerate each collection in the same way. 8. Show rents collected from each parcel, or from which ones collected. 9. Designate each parcel sold, in the same way. 10. Appraised value. 11. Appraised value. 12, 13. And any other parcels or property lost. 14. Or, letters testamentary. 15. If a will was probated, say, "The names of the legatees and devisees named in the will of said deceased admitted to probate herein are as follows, to wit: _____"

§ 680. Form. Memorandum, by clerk, fixing time for hearing of final account and petition for distribution.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.] }

_____, the administrator² of the estate of _____, deceased, having this day filed and presented for final settlement his final account of his administration of said estate, together with _____ report accompanying the same, and his petition for the distribution of the residue of said estate to the persons entitled thereto, —

Now, I, _____, clerk of said _____ court, do hereby fix and appoint _____,³ the _____ day of _____ 19____, at _____ o'clock in the forenoon of said day,⁴ in the court-room of

said court, at the court-house in said county of —, as the time and place for the hearing upon said final account and petition of distribution. —, Clerk of the — Court.

Dated —, 19—. By —, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Give day of week. 4. Or as the case may be.

§ 681. Form. Order appointing day for hearing petition for distribution and settlement of final account.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

—, the administrator² of the estate of —, having this day filed for final settlement an account of his administration of the affairs of said estate, accompanied by the filing of a petition for the final distribution of said estate, among the persons entitled thereto, —

It is ordered, That —,³ the — day of —, 19—, at — o'clock in the forenoon⁴ of said day, and the court-room of said court,⁵ at —, in the said county⁶ of —, state of —, be, and the same are hereby, appointed as the time and place for the settlement of said account and the hearing of said petition; and that the clerk of this court give notice thereof for at least ten⁷ days prior to the day of settlement, by posting notices according to law.⁸

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Day of week. 4. Or, afternoon. 5. Give location of court-room. 6. Or, city and county. 7. Or other time prescribed by statute. 8. Or in such other manner as the court or judge may direct. In case the clerk fixes the day, as required by the statute, no order of court is necessary.

§ 682. Form. Notice of settlement of final account and distribution.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

Notice is hereby given: That —, administrator² of the estate of —, deceased, has rendered and presented for

final settlement, and filed in said court, his final account of his administration of said estate, together with his report and a petition for final distribution, and that _____,³ the _____ day of _____, 19____, at _____ o'clock in the forenoon⁴ of said day, at the court-room of said court at the court-house in said county,⁵ has been fixed and appointed as the time and place for the settlement of said account and the hearing of said report and petition, at which time and place any person interested in said estate may appear and file his exceptions, in writing, to the said account, and contest the same.

Notice is further given: That said account is for final settlement, and the said estate is ready for distribution, and on confirmation of said final account final distribution of said estate will be immediately had.

Dated this _____ day of _____, 19____. _____, Clerk.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Day of week. 4. Or, afternoon. 5. Or, city and county.

§ 683. Form. Affidavit of posting notice of settlement of final account and distribution.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

State of _____,
County² of _____, } ss.

_____, deputy county clerk of said county,³ being duly sworn, says: That on the _____ day of _____, 19____, he posted correct and true copies of the within notice in three of the most public places in said county,⁴ to wit, one of said copies at the place at which the court is held, one at _____,⁵ and one at _____,⁶ in said county.⁷

Subscribed and sworn to before me this _____ day of _____ 19____. _____, County Clerk.⁸

Explanatory notes. Give file number. 2-4. Or, City and County. 5, 6. As, at the city hall, land-office, United States post-office, in the _____, in said county. 7. Or, city and county. 8. Or other officer taking the oath.

§ 684. Form. Order settling final account and for distribution.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes _____, the administrator of said estate, by _____, his attorney, and proves to the satisfaction of the court that his final account and petition for distribution herein was rendered and filed on the _____ day of _____, 19____; that on the same day the clerk of this court appointed _____,² the _____ day of _____, 19____, for the settlement and hearing thereof; that due and legal notice of the time and place of said settlement and hearing has been given, as required by law;³ and said account and petition being now presented to the court, and no person appearing to except to or contest said account or petition,⁴ the court, after hearing the evidence, being satisfied that all taxes upon the property of the estate (and any inheritance tax which was due and payable) have been fully paid, settles said account, and orders distribution of said estate as follows:

It is ordered, adjudged, and decreed by the court, That said administrator has in his possession, belonging to said estate, after deducting the credits to which he is entitled, a balance of _____ dollars (\$_____), of which _____ dollars (\$_____) is in cash, and the remainder consists of the property hereinafter described, at the value of the appraisement; that said account be allowed and settled accordingly; that said deceased died intestate, and left surviving, as his only heirs at law, certain persons, whose names and relationship to the deceased are as follows, to wit: _____;⁵ that, out of the residue of cash in his hands, said _____ pay _____ dollars (\$_____), hereby allowed as attorneys' fees, and retain _____ dollars (\$_____) as his commission allowed by law for his services; and that the balance of cash in his hands, and all the residue of the property of said estate as hereinafter described, and all other property belonging to said estate, whether described herein or not, be distributed as follows, to wit: _____⁶ thereof to _____;⁷ _____⁸ thereof to _____;⁹ and _____¹⁰ thereof to _____;¹¹ etc.

The property of said estate hereby distributed, so far as the same is known, is described as follows:

1. Balance of cash as aforesaid, _____ dollars (\$_____).

2. _____¹² _____, County Clerk.

Entered _____, 19____. By _____, Deputy.

Explanatory notes. 1. Give file number. 2. Day of week. 3. If the matter has been continued, say, "and the same having been by the court regularly postponed to the present time." 4. Or, _____ having appeared by _____, his attorney, and filed and presented objections and exceptions to said petition. 5. Give names of widow and children, or other heirs at law. 6. State fractional part. 7. Name of heir. 8. Fractional part. 9. Name of heir. 10. Fractional part. 11. Name of heir. 12. Describe the other property, with its valuation as stated in the inventory.

§ 685. Form. Another form of order settling final account and for distribution.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

_____, administrator of the estate of _____, deceased, having on the _____ day of _____, 19____, rendered and filed herein a full account and report of his administration of said estate, which account was for final settlement, and having with said account filed a petition for the final distribution of the estate;

And said account and petition this day coming on regularly to be heard,² and proof having been made to the satisfaction of the court that the clerk had given notice of the settlement of said account and the hearing of said petition, in the manner and for the time heretofore ordered and directed by the court;

And it appearing that said account is in all respects true and correct; that it is supported by proper vouchers; that the residue of money in the hands of the administrator, at the time of filing said account, was _____ dollars (\$_____); that, since the rendition of said account, the sum of _____ dollars (\$_____) has been received by the administrator; that the sum of _____ dollars (\$_____) has been expended

by him as necessary expenses of administration, the vouchers whereof, together with a statement of such expenditures and disbursements, are now presented and filed; and that the estimated expenses of closing the estate will amount to _____ dollars (\$_____), leaving a residue of _____ dollars (\$_____);

And it appearing that all claims and debts against said decedent, all taxes on said estate,³ and all debts, expenses, and charges of administration have been fully paid and discharged; that said estate is ready for distribution and in condition to be closed;

That the said estate is community⁴ property; and

That said _____ died intestate, and left as his only heirs, who are entitled to distribution of his estate, the following named persons: _____;⁵ —

It is ordered, That said payments are approved, and said statement of expenditures and disbursements is now settled and allowed.

It is further ordered, adjudged, and decreed, That the said final account of the said _____ be, and the same is hereby, settled, allowed, and approved, and that the residue of said estate hereinafter particularly described, and any other property which may belong to the said estate, or in which the said estate may have any interest, be, and the same is hereby, distributed as follows: _____.⁶

The following is a particular description of the said residue of said estate referred to in this decree, and of which distribution is now ordered as aforesaid: _____.⁷

Done in open court, _____, 19____.

_____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. If the matter has been continued, say, "and the hearing having been regularly continued by the court to the present time." 3. If any inheritance tax was due or paid, insert, "and all inheritance taxes which have become due and payable." 4. Or, separate. 5. Give names. 6. State manner, giving names of distributees, and proportion or part of each. 7. Describe the property.

§ 686. Form. Order settling final account, report, and petition for distribution under will.

[Title of court.]

[Title of estate.] { No. ____.¹ Dept. No. ____
[Title of form.] }

Now comes —, the executor of said estate, by —, his attorney, and proves to the satisfaction of the court that his final account and petition for distribution herein was rendered and filed on the — day of —, 19—; that on the same day the clerk of this court appointed the — day of —, 19—, for the settlement and hearing thereof; that due and legal notice of the time and place of said settlement and hearing has been given as required by law;² and the said account and petition being now presented to the court, and no person appearing to except to or contest said account or petition, the court, after hearing the evidence, being satisfied that all taxes upon the property of the estate (and any inheritance tax which has become due and payable) have been fully paid, settles said account, and orders distribution of said estate as follows:

It is ordered, adjudged, and decreed by the court, That said executor has in his possession, belonging to said estate, after deducting the credits to which he is entitled, a balance of — dollars (\$—), of which — dollars (\$—) is in cash, and the remainder consists of the property herein-after described, at the value of the appraisement; that said account be allowed and settled accordingly; and that, in pursuance of and according to the provisions of the last will of said deceased, the said property is distributed as follows, to wit: —.³

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. If the matter has been continued, say, "and the said matter having been regularly postponed by the court to the present time." 3. State manner of distribution, designating the persons to whom made, and part awarded to each one, and describing the property so far as known, also the share of each distributee in any residue unknown, etc.

§ 687. Interested party may file exceptions to account. On the day appointed, or any subsequent day to which the hearing may be postponed by the court, any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same. **Kerr's Cyc. Code Civ. Proc.**, § 1635.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 863, p. 323.
Arizona.* Rev. Stats. 1901, par. 1869.
Idaho.* Code Civ. Proc. 1901, sec. 4255.
Montana.* Code Civ. Proc., sec. 2793.
Nevada. Comp. Laws, sec. 2974.
New Mexico. Laws 1901, sec. 28, p. 156.
North Dakota.* Rev. Codes 1905, § 8197.
Oklahoma.* Rev. Stats. 1903, sec. 1733.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1203.
South Dakota.* Probate Code 1904, § 285.
Utah. Rev. Stats. 1898, sec. 3947.
Washington.* Pierce's Code, § 2650.
Wyoming.* Rev. Stats. 1899, sec. 4723.

§ 688. Form. Exceptions to account.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 { [Title of form.]

Now comes —, who is interested in the estate of —, deceased, being one of his heirs at law,² and files these, his exceptions in writing, to the account of —, the administrator³ of the estate of said deceased, filed herein on the — day of —, 19—.

He, the said contestant of said account, contests and objects to the allowance of any item therein, on the ground that said account was not made under oath.

Contestant particularly objects to the following claims, to wit, the claim of — and the claim of —, on the ground that the deceased did not owe the same, or any part thereof, at the time of his death, the same being, at that time, barred by the statute of limitations.

The contestant particularly objects to the following claims, to wit, the claim of — and the claim of —, on the

ground that the same were not presented within the time limited in the notice to creditors.

The contestant particularly objects to the following items, to wit, the item — and the item —, on the ground that they are not a proper charge against the said estate.

The contestant particularly objects to the following items, to wit, the item — and the item —, on the ground that the charges are exorbitant.

And, finally, contestant particularly objects to each and every item of said account which decreases the value of the homestead set apart for the use of the family of deceased, or which decreases the family allowance made herein.⁴

—, Attorney for Contestant. —, Contestant.

Explanatory notes. 1. Give file number. 2. Or, legatee or devisee; or, state other relationship or interest. 3. Or, executor of the last will and testament, etc. 4. Specify items decreasing value of homestead, and show how such value is decreased.

§ 689. Contest by heirs. Hearing. Referee. All matters, including allowed claims not passed upon on the settlement of any former account, or on rendering an exhibit, or on making a decree of sale, may be contested by the heirs, for cause shown. The hearing and allegations of the respective parties may be postponed from time to time, when necessary, and the court may appoint one or more referees to examine the accounts, and make report thereon, subject to confirmation; and may allow a reasonable compensation to the referees, to be paid out of the estate of the decedent. Whenever an allowed claim is contested by any heir, or other person entitled to contest it, either the contestant or the claimant is entitled to a trial by jury of the issues of fact presented by the contest; and it is the duty of the court, at request of either party, to call a jury and submit to them such issues, and, after receiving their verdict, to enter an order disposing of such contest in accordance therewith. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 502), § 1636.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1870.

Idaho. Code Civ. Proc. 1901, sec. 4256.

Montana. Code Civ. Proc., sec. 2794.

Nevada. Comp. Laws, sec. 2976.

New Mexico. Laws 1901, sec. 28, p. 156.

North Dakota. Rev. Codes 1905, § 8192.

Oklahoma. Rev. Stats. 1903, sec. 1734.

South Dakota. Probate Code 1904, § 286.

Washington. Pierce's Code, § 2652.

Wyoming. Rev. Stats. 1899, sec. 4724.

§ 690. Form. Order appointing referee of administrator's account and adjourning settlement.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

____, the administrator ² of the estate of ____, deceased, having rendered his account for settlement, and notice of such settlement having been duly given as ordered by this court, —

It is hereby ordered, That ____, Esq., be, and he is hereby, appointed a referee to examine the said account, and make report thereon to this court within ____,³ and that the settlement of said account be adjourned until ____,⁴ the ____ day of ____, 19____, at ____ o'clock in the forenoon ⁵ of said day.

Dated ____, 19____. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, administratrix. 3. State the time. 4. Day of the week. 5. Or, afternoon.

§ 691. Form. Order referring account to court commissioner for examination and report.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

In this matter, the hearing of the ____ account of ____, administrator ² of the estate of ____, deceased, coming on regularly to be heard this day, —

It is hereby ordered, That ____, court commissioner of the county ³ of ____, state of ____, examine the said account filed in this court on the ____ day of ____, 19____,

and report the same to this court with all convenient dispatch.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or, city and county.

§ 692. Form. Referee's report of examination of account.

[Title of court.]

[Title of estate.] { No. —¹ Dept. No. —
[Title of form.] }

In pursuance of an order of this court made and entered on the — day of —, 19—, appointing me, the undersigned, a referee to examine the —² account of —, administrator³ of the estate of —, deceased, rendered for settlement and filed in this court on the — day of —, 19—, and to make report thereon, I now report as follows:

That I have fully and carefully examined said account, and find that it contains a just and full statement of all the moneys received and disbursed by the administrator⁴ during the period covered by said account.

I have examined the vouchers in support of said account, and find proper vouchers for all items of expenditure, except as to —⁵ items. No vouchers were produced for these said items, but each of said items was proved before me, by the oath positive of the said administrator,⁶ as attached to said account, which oath is uncontradicted, that such items were actually paid by him, on the dates when, at the places where, and to the persons named in said account as having received such payment.

I am satisfied that said account as presented is just, true, and correct. I therefore recommend that it be allowed and approved, and that a decree be entered to that effect.

Respectfully submitted.

Dated —, 19—.

—, Referee.

Explanatory notes. 1. Give file number. 2. State character of account. 3, 4. Or, executor. 5. Give number of items, with character thereof, and amount; but no item must exceed twenty dollars (\$20), and the whole thereof must not exceed five hundred dollars (\$500). 6. Or, executor, etc.

§ 693. Settlement of accounts to be conclusive when, and when not. The settlement of the account and the allowance thereof by the court, or upon appeal, is conclusive against all persons in any way interested in the estate, saving, however, to all persons laboring under any legal disability, their right to move for cause to reopen and examine the account, or to proceed by action against the executor or administrator, either individually or upon his bond, at any time before final distribution; and in any action brought by any such person, the allowance and settlement of the account is prima facie evidence of its correctness. **Kerr's Cyc. Code Civ. Proc., § 1637.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 864, p. 323.
- Arizona.*** Rev. Stats. 1901, par. 1871.
- Colorado.** 3 Mills's Ann. Stats., sec. 4807.
- Idaho.** Code Civ. Proc. 1901, sec. 4257.
- Montana.*** Code Civ. Proc., sec. 2795.
- Nevada.** Comp. Laws, sec. 2977.
- New Mexico.** Laws 1901, sec. 29, p. 156.
- North Dakota.** Rev. Codes 1905, § 8199.
- Oklahoma.*** Rev. Stats. 1903, sec. 1735.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1204.
- South Dakota.*** Probate Code 1904, § 287.
- Utah.*** Rev. Stats. 1898, sec. 3946.
- Washington.** Pierce's Code, § 2653.
- Wyoming.*** Rev. Stats. 1899, sec. 4725.

§ 694. Proof of notice of settlement of accounts. The account must not be allowed by the court until it is first proved that notice has been given as required by this chapter, and the decree must show that such proof was made to the satisfaction of the court, and is conclusive evidence of the fact. **Kerr's Cyc. Code Civ. Proc., § 1638.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 870, p. 324.
- Arizona.*** Rev. Stats. 1901, par. 1872.
- Colorado.** 3 Mills's Ann. Stats., sec. 4806.
- Idaho.*** Code Civ. Proc. 1901, sec. 4258.

Montana.* Code Civ. Proc., sec. 2796.

Nevada.* Comp. Laws, sec. 2978.

North Dakota.* Rev. Codes 1905, § 8200.

Oklahoma.* Rev. Stats. 1903, sec. 1736.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1210.

South Dakota.* Probate Code 1904, § 288.

Utah. Rev. Stats. 1898, sec. 4036.

Washington.* Pierce's Code, § 2654.

§ 695. Form. Affidavit of posting notice of settlement of account.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County² of _____, } ss.

_____, deputy county clerk of said county,³ being duly sworn, says: That on the _____ day of _____, 19____, he posted correct and true copies of the within notice in three of the most public places in said county,⁴ to wit, one of said copies at the place at which the court is held,⁵ one at _____,⁶ and one at _____,⁷ in said county.⁸

Subscribed and sworn to before me this _____ day of _____, 19____.
_____, Deputy County Clerk.

Explanatory notes. 1. Give file number. 2-4. Or, City and County. 5. Designate the place. 6. As, city hall. 7. As, the United States post-office, designating its location. 8. Or, city and county.

§ 696. Form. Decree settling account.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Comes now _____, the administrator² of said estate, by _____, his attorney, and presents to the court for settlement his account, showing charges in favor of said estate amounting to _____ dollars (\$____), and claiming credits amounting to _____ dollars (\$____), leaving a balance of _____ dollars (\$____) in his³ hands belonging to said estate; and he now proves to the satisfaction of the court that said account was filed on the _____ day of _____, 19____; that on

the same day the clerk appointed the ____ day of ____, 19____, as the day for the settlement thereof; and that notice of the time and place of said settlement has been duly given as required by law and as ordered by the court;⁴ and no person appearing to except to or to contest said account,⁵ the court, after hearing the evidence, finds⁶ that said account is correct and that it is supported by proper vouchers.

It is therefore ordered, adjudged, and decreed by the court, That said account be in all respects as the same was rendered and presented for settlement, approved, allowed, and settled.

____, County Clerk.

Entered ____, 19____.

By ____, Deputy.

Explanatory notes. 1. Give file number. 2. Or, administratrix; or as the case may be. 3. Or, her. 4. If the matter has been continued, say, "and said settlement having been by the court regularly postponed to this day." 5. Or, and ____, having appeared by ____, his attorney, and filed his exceptions and objections to said account. 6. Or, if corrections are made, say, "corrects and settles the same as follows (showing the corrections). The order will then run as follows: It is therefore ordered, adjudged, and decreed by the court that the said account be, and the same is hereby, corrected so that the same show charges in favor of said estate amounting to ____ dollars (\$____), leaving a balance of ____ dollars (\$____) belonging to said estate; and that, as so corrected, the same be allowed and settled.

§ 697. Presentation of account. Death of representative.

If any executor or administrator dies, his accounts may be presented by his personal representatives to, and settled by, the court in which the estate of which he was executor or administrator is being administered, and, upon petition of the successor of such deceased executor or administrator, such court may compel the personal representatives of such deceased executor or administrator to render an account of the administration of their testator or intestate, and must settle such account as in other cases. **Kerr's Cyc. Code Civ. Proc.**, § 1639.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

New Mexico. Laws 1907, sec. 3, p. 157.

ACCOUNTING AND SETTLEMENT BY EXECUTORS AND ADMINISTRATORS.

1. In general.
2. Duty to account.
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4. Account must show what.
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1. **In general.** The final settlement of an executor or administrator must precede distribution, whether the petition for distribution is filed with his final account or subsequent to the final settlement: *Smith v. Westerfield*, 88 Cal. 374, 379; 26 Pac. Rep. 206; *Estate of Sheid*, 122 Cal. 528, 531; 55 Pac. Rep. 328. An order requiring the ancillary administrator to deliver the residuum of the assets of the estate to the domiciliary administrator appointed in another jurisdiction should not be granted before the allowance of the final account: *Estate of Youmans*, 10 Haw. 207, 208. There is no requirement that payment of claims against an executor or administrator for services rendered or materials furnished to the estate during the administration be made before they can be allowed in the settlement of his account: *Estate of Coutts*, 87 Cal. 480, 482; 25 Pac. Rep. 685; *Pennie v. Roach*, 94 Cal. 515, 522; 29 Pac. Rep. 956; 30 Pac. Rep. 106; *Estate of Dudley*, 123 Cal. 256, 257; 55 Pac. Rep. 897. The disposition which the court may make of moneys in the hands of executors or administrators which belong to the estate is immaterial to them. All that they are concerned in upon the settlement of the account is to be credited with the various payments they have made, and to have the accounts settled according to the correct amount in their hands. Whatever disposition the court makes of this amount is no concern of theirs, and if the parties interested therein make no objection to the order, they should be content: *Estate of Sarment*, 123 Cal. 331, 335; 55 Pac. Rep. 1015. The administrator, on settlement of his accounts, cannot set off a debt due him personally against the share of a distributee; but he may redeem the whole or any part of a distributive share in satisfaction of a debt due from the distributee to the estate, including costs charged against him in legal proceedings: *Dray v. Bloch*, 29 Or. 347; 45 Pac. Rep. 772. For instructive cases on accounting and settlement of executors or administrators, see *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521; *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607; *Estate of Adams*, 131 Cal. 415; 63 Pac. Rep. 838; *Estate of Pease*, 149 Cal. 167; 85 Pac. Rep. 149; *In re Roach's Estate* (Or.), 92 Pac. Rep. 118. An accounting is always a necessary preliminary to a final distribution: *Toland v. Earl*, 129 Cal. 148, 152; 79 Am. St. Rep. 100; 61 Pac. Rep. 914.

2. **Duty to account.** It is the duty of every executor or administrator, within six months after notice of his appointment, and every six months thereafter, until the estate is settled, to file a semi-annual account; and the county court must, at the first term after such

account is filed, ascertain and determine if the estate be sufficient to satisfy the claims presented and allowed within the first six months, or any succeeding six months thereafter, after paying the funeral charges and expenses of administration, and if so, it shall so order and direct; but if the estate be insufficient for that purpose, it shall ascertain what per centum it is sufficient to satisfy, and direct accordingly: *Rostel v. Morat*, 19 Or. 181; 23 Pac. Rep. 900. An executor must account, and his responsibilities as executor can terminate only after compliance with the statute, and after a settlement, approved by the court, has been made, and after a distribution and a delivery up have been ordered by the court: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 517. From the expiration of the time mentioned in the notice to creditors, it is the duty of the executor to account. His obligation to account is continuous, and does not become barred by the statute of limitations. The right to demand an account from him runs with his duty, and can be asserted so long as his duty remains unperformed, and where there is no such laches as a court of equity will consider sufficient reason for dismissing an appeal to its jurisdiction: *Estate of Sanderson*, 74 Cal. 199, 215; 15 Pac. Rep. 753. See *Irwin v. Holbrook*, 26 Wash. 89; 66 Pac. Rep. 116. It is the duty of the domiciliary executor to gather in and account for the foreign assets to the extent of his conscious ability to do so, and the court of the domicile has a corresponding authority to compel him to account for wilful neglect to perform such duty. All the authorities agree that the residuum of the foreign assets must finally be collected and distributed by the domiciliary executor: *Estate of Ortiz*, 86 Cal. 306, 316; 24 Pac. Rep. 1034. A sole legatee may require an executor to account in the probate court at any time after the latter's neglect, whereby a loss has occurred to the estate: *Wheeler v. Bolton*, 92 Cal. 159, 175; 28 Pac. Rep. 558. An executor, though a trustee under the will, must account to the probate court: *Dougherty v. Bartlett*, 100 Cal. 496, 499; 35 Pac. Rep. 431. Each co-executor may keep a separate account, and present the same for final settlement. In such a case, each is chargeable with the full amount of assets which has come into his hands, and is entitled to be credited with all disbursements legally made by him on behalf of the estate: *Hope v. Jones*, 24 Cal. 90, 93. Where it is not charged that any of the property or assets of one deceased person has come into the possession or under the control of an administratrix of another estate, she cannot be called upon to file an account, as her trust as administratrix of one estate does not create the duty to file an account in another estate: *Cross v. Baskett*, 17 Or. 84; 21 Pac. Rep. 47. If the final account of an executor or administrator be disapproved by the court, he may either appeal from the decree disallowing the same, or file another account to meet the objections of the court: *Rostel v. Morat*, 19 Or. 181; 23 Pac. Rep. 900.

3. Notice of settlement. The manner in which notice of the settlement of the account of an executor or administrator is to be given is prescribed by statute, such as causing notices to be posted, etc., and it is quite apparent that if such notice is not given there can be no valid settlement of the account, and consequently no valid order made for the payment of a claim against the estate for money loaned by the claimant to decedent. The code seems to contemplate an order for the payment of a debt only upon the settlement of the administrator's account, but if it be assumed that such an order could be made before such settlement, still it would clearly be of no force if made without notice: *Estate of Spanier*, 120 Cal. 698, 701; 53 Pac. Rep. 357. If the account is for a final settlement, accompanied by a petition for distribution, the notice must state those facts, and must be for at least the time prescribed by the statute: *Estate of Grant*, 131 Cal. 426, 429; 63 Pac. Rep. 731. The efficacy of a notice of settlement of the final account of an administrator is not destroyed by the subsequent removal of the administrator and the appointment of another in his place, and such removal does not render it necessary to give another notice: *State v. O'Day*, 41 Or. 495; 69 Pac. Rep. 542, 545. It is not a valid objection to the sufficiency of the affidavit of posting the notice of the time fixed for the hearing on settlement of a final account and distribution, that the affidavit was made on the day of posting, instead of being made at the expiration of the time for which the notice was published, especially where the decree recites due service by publication and posting. Such recital is sufficient to prove service, as against a collateral attack, and the presumption is that the notice remained posted during the statutory period: *Crew v. Pratt*, 119 Cal. 139, 153; 51 Pac. Rep. 38. If all the heirs appear or are represented at the hearing or settlement of a final account and distribution, this is a sufficient answer to any objection to the sufficiency of the notice of the hearing: *Crew v. Pratt*, 119 Cal. 139, 153; 51 Pac. Rep. 38.

REFERENCES.

Remedy of distributee as to accounting of which he had no notice, and on which he did not appear: See note 63 L. R. A. 95-108.

4. Account must show what. The account of an executor or administrator must show the amount of money in his hands belonging to the estate, and if it is a matter of interest to those beneficially interested, it is competent for the court to require a specification of the kind of money received: *Magraw v. McGlynn*, 26 Cal. 421, 429. The account should also show that a failure to collect a debt due to decedent was not the result of the negligence of the executor or administrator: *Estate of Sanderson*, 74 Cal. 199, 203. When an estate is fully administered, the executor or administrator is required to file his final account, which must contain a detailed account of moneys

received and expended by him, from whom received, and to whom paid, and refer to the vouchers for such payments, and the amount of money and property, if any, remaining unexpended or unappropriated. But where property of an estate was disposed of at public auction, or by private sale, and the administrator shows that it was impossible to check up the sales with the inventory, so as to be able to say with any degree of certainty that any goods remained on hand, or whether they were sold for more or less than their appraised value; that it was impossible to keep an account of what each article sold for at the auction; that it was impracticable and almost impossible to keep an account of the names of the persons to whom the property was sold, whether at the private sale or the public auction, — the court, if satisfied that the administrator made an honest effort to dispose of the property for the best interest of all concerned, will treat his account as final, though it does not appear therefrom from whom the money was received, or what property, if any, remains undisposed of, where a corrected report cannot be had, and the ends of justice can better be subserved by treating the account as a final settlement of the estate: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 523.

5. Order for payment of dividend. An order for the payment of a dividend required by the statute is not, strictly speaking, a part of the proceeding for the settlement of the account, or of the adjudication respecting the claims reported therein. It follows thereon, but it is not a part thereof. It may, of course, be made immediately after the account is settled, but this does not make it a part of the proceeding. On the other hand, it cannot be made until after the account is settled, and it may be deferred to a considerable time thereafter, and be made without notice. It is a part of the proceeding for the administration of the estate, considered as a whole, but it is not, specifically, a part of the proceeding for the settlement of the account. The persons in whose favor such order for a dividend is made do not thereby become parties to the proceeding for the settlement of the account in cases where they did not appear or make any objection or contest upon such settlement: *Estate of McDougald*, 143 Cal. 476, 480; 77 Pac. Rep. 443; 79 Pac. Rep. 878, 879.

6. Vouchers. Where expenditures have been made, and the executor testifies, without opposition, both to the fact of payment and to the contents of letters acknowledging the receipt of payment, the items of the payment thus proved are sufficiently vouched to justify the charges, in the absence of counter-evidence: *Estate of Hilliard*, 83 Cal. 423, 425; 23 Pac. Rep. 393. But an order settling the final account of an administrator will be reversed for want of proper vouchers, if the proof as to the correctness of the account is too

general and indefinite: *Estate of Rose*, 63 Cal. 349, 351. Where the statute requires the executor or administrator to produce and file vouchers for all charges, debts, claims, and expenses which he has paid, there ought to be a reasonable effort to comply with the statute, and he is not entitled to credit his payments made without a reasonable explanation why the vouchers are not produced. If the voucher is lost, or for other good reason cannot be produced on the settlement, the payment may be proved by the oath of any competent witness, or of the executor or administrator. Items of expenses, not accompanied by the proper vouchers, should ordinarily be disallowed, but it does not follow that they may not afterwards be allowed on a proper showing: *Rice v. Tilton*, 14 Wyo. 101; 82 Pac. Rep. 581. Where all parties agree that money has been properly expended, and no claim is made on the money paid out, there is no error in allowing the account without vouchers: *Estate of Coursen* (Cal.), 65 Pac. Rep. 965, 967. But it is error to allow items in the account aggregating more than fifteen hundred dollars for which no vouchers are produced, and as to which there is no testimony regarding when, where, or to whom the payments were made: *Estate of Van Tassel* (Cal.), 5 Pac. Rep. 611. Items rejected in an account may subsequently be allowed by producing proper vouchers: *Walls v. Walker*, 37 Cal. 424, 426; 99 Am. Dec. 290; *Estate of Adams*, 131 Cal. 415, 417; 63 Pac. Rep. 838. But an order settling the final account of an executor or administrator will be reversed for want of proper vouchers: *Estate of Rose*, 63 Cal. 349, 350. An order for the payment of money is not a voucher. A voucher must tend to show that the items represented in it were included or paid in or about the business of the administration of the estate: *Estate of Rose*, 63 Cal. 349, 350. A receipt taken by an administrator, who is an attorney in fact, to himself as administrator, for money due to a claimant against the estate, which receipt is subscribed with the claimant's name, by the administrator, as attorney in fact, is not a voucher: *Estate of Watkins*, 121 Cal. 327; 53 Pac. Rep. 702. The production of a voucher, purporting to be for a "balance," is prima facie evidence that no more was unpaid, and throws upon the contestant the burden of showing the contrary: *Estate of Sarment*, 123 Cal. 331, 335; 55 Pac. Rep. 1015.

7. Hearing.

(1) **In general.** Upon the settlement of an account, every creditor, heir, legatee, or devisee is a person interested, and, as such, has a right to enter an appearance, to become a party, and to be heard; and unless they appear, they are to be considered as having no objections to the account as rendered, and as consenting that it may be settled accordingly: *Estate of McDougald*, 143 Cal. 476, 479; 77 Pac. Rep. 443; 79 Pac. Rep. 878, 879. The parties interested in the estate are entitled to be heard upon the propriety of charges against the estate:

Gurnee v. Maloney, 38 Cal. 85, 88; 99 Am. Dec. 352. Matters which, in the nature of things, are out of place in the settlement and accounting, however, should not be considered by the court. The only items which are properly to be settled in the account of an executor or administrator are items relating purely to his administration of the estate, charges of administration, and payment of debts of the decedent: *Estate of Willey*, 140 Cal. 238, 242; 73 Pac. Rep. 998. Thus where, in anticipation of distribution to them as devisees in trust, the executors made certain payments to those claiming as beneficiaries of the trust, the propriety of these payments ought not to be determined on the settlement of their account as executors, for it may appear that the estate may never be distributed to them, and in that case the allowance to them of such payments in settlement of their account as executors would be a wrong to the rightful distributees. If, on the other hand, the estate is distributed to them, they can protect themselves by simply charging the beneficiaries with the sums paid to them respectively. If their charges are disputed, the determination of their correctness will devolve upon the court having jurisdiction of the trust. In case the estate is not ultimately distributed to the executors as devisees in trust, but is distributed to some or all of those to whom these payments have been made, such payments can be deducted from their distributive shares by the decree of distribution: *Estate of Willey*, 140 Cal. 238, 243; 73 Pac. Rep. 998. Whether a person claiming to have an interest in an estate is entitled to any standing is a matter which is to be determined on the hearing of the distribution, rather than upon the settlement of an account, and particularly is this true where the items contained in the account are obviously improper, and it is the duty of the court, for that reason, and of its own motion, to reject them: *Estate of Willey*, 140 Cal. 238, 243; 73 Pac. Rep. 998. Advances by an executor or administrator are made at his own risk: *Estate of Knight*, 12 Cal. 200, 208; *Tompkins v. Weeks*, 26 Cal. 50, 61. The question whether the appraisers of an estate are disinterested parties is not necessary to be determined on the settlement of an executor's account, and cannot affect his right to have his account settled: *Estate of Millenovich*, 5 Nev. 161, 178.

(2) **Matters not to be considered.** On the settlement of an account it is improper to consider questions in advance of distribution, that should be determined exclusively upon distribution, such as the rights of legatees and devisees. Such rights are fixed by the decree of distribution, and can only be determined on distribution. It must be apparent that the determination of the validity of the general trust provisions of a will, the validity of particular trusts in favor of various beneficiaries, the net annual income of the trust estate, and the identity of beneficiaries themselves, which matters may so radically affect the rights of beneficiaries under any will, can only be legally

and effectively determined upon distribution, and that any effort to have them determined in the settling of an account must, in the nature of things, be out of place: *Estate of Willey*, 140 Cal. 238, 242; 73 Pac. Rep. 998. In the settlement, whether the account be intermediate or final, advance payments made by the executor or administrator, under his own construction of the terms of the will, to the beneficiaries named therein, and upon his own judgment, without an order of the court, cannot be considered. Such items may properly be retired from the account and considered when the petition for the distribution of the estate is heard: *Estate of Willey*, 140 Cal. 238, 241, 243; 73 Pac. Rep. 998. On final settlement and accounting, the court should not construe the will: *Estate of Willey*, 140 Cal. 238; 73 Pac. Rep. 998. So where an administratrix received a gift from the decedent, as his daughter, the question whether the decedent, at the time of the transfer to her, was holding the property in question in trust for the estate represented by the contestant of the final account, and whether the daughter is chargeable with the same trust, cannot be determined upon the contest of a final account of a daughter as administratrix of the estate of her deceased father. That question can only be determined in a personal action against her to enforce the trust: *Estate of Vance*, 141 Cal. 624, 628; 75 Pac. Rep. 323. And the probate court has no jurisdiction to hear and determine the question as to where the real title to property rests: *In re Haas*, 97 Cal. 232, 234; 31 Pac. Rep. 893. It cannot determine disputes between heirs or devisees and strangers as to the title to property: *Buckley v. Superior Court*, 102 Cal. 6, 8; 41 Am. St. Rep. 135; 36 Pac. Rep. 360. Neither does it have jurisdiction to determine the existence of an alleged partnership, which is denied, especially where one of the alleged partners has not been cited to appear, and is not before the court: *Wright v. Wright*, 11 Col. App. 470; 53 Pac. Rep. 684, 686. The question as to what particular contracts may have been entered into between parties as to the apportionment of the executors' commissions is a matter which should be heard in another forum; as where one of two executors claims that it was agreed between them that if one should do all of the work, he should receive all of the commissions. The hearing of a final account by the probate court is not a place to settle disputes of this character. Matters of this kind are of no interest to the estate, and must be heard and determined at some other time and in some other proceeding: *Estate of Carter*, 132 Cal. 113; 64 Pac. Rep. 123, 124. So where an executor has remained in possession of property for twenty years, claiming no right except as executor, and eventually presents his final account as such, asking for a settlement and discharge, he will not be heard in such proceeding to object to the jurisdiction of the court: *In re Moore*, 95 Cal. 34, 36; 30 Pac. Rep. 106. If a charge for interest against the executor or administrator is not included in the grounds of contest

against the account by the creditors, it cannot be considered: *Estate of Sylvar*, 1 Cal. App. 35, 38; 81 Pac. Rep. 663.

8. Exceptions. Contest. Objections. Evidence.

(1) **In general.** An exception may be taken to an account on the ground that credits appear therein which are not such as the executor is entitled to as a matter of law; as, if an executor shall attempt to set off, as against money or property of the estate, which has passed into his hands, individual expenditures of his own, from which the estate could receive no benefit, and for which it is in no way answerable: *Estate of Sanderson*, 74 Cal. 199, 204; 15 Pac. Rep. 753.

(2) **Exceptions as aid to court.** Exceptions are permitted in aid of the court, when performing its duty of making the account correct; but they do not affect the power of the court to supervise, in every particular, the accounts of executors and administrators, which power is conferred for the protection of all interested, including infants, and oftentimes adults ignorant of their rights: *Estate of Sanderson*, 74 Cal. 199, 210; 15 Pac. Rep. 753. It is not improper for the court to listen to objections to the account of an executor or administrator in advance of the filing of written objections: *Estate of Kennedy*, 120 Cal. 458, 463; 52 Pac. Rep. 820. If a person interested in an estate wishes to contest an account presented for settlement by an executor or administrator, he must file his exceptions in writing to the account, setting out specifically the grounds of his objections; and, at the hearing, he should be held limited to the exceptions so presented. But, whether exceptions are filed or not, the court should carefully examine every account presented for settlement, and be satisfied that it is in every respect practically correct before rendering an order settling it: *Estate of More*, 121 Cal. 635, 639; 54 Pac. Rep. 148.

(3) **Right to appear and contest.** The right to appear and contest the account of an executor or administrator is restricted to persons who are interested in the estate, but where there is any doubt as to the question of interest, it ought to be resolved in favor of petitioner. In other words, if he has the appearance of interest, his right to contest ought not to be denied: *Garwood v. Garwood*, 29 Cal. 514, 519. A creditor is entitled to appear in the probate court and to file objections in writing to the account, and to contest the same: *Tompkins v. Weeks*, 26 Cal. 51, 58. An administrator may appear and contest the account of his predecessor. It is his duty to protect the estate against unlawful claims of creditors; and it is also the duty of the court to do so, at the suggestion of any person or on its own motion: *Estate of Spanier*, 120 Cal. 698; 53 Pac. Rep. 357, 359. A guardian of the estate of minors has the right to appear and contest the account of an administrator in an estate where his wards are inter-

ested; and the appointment of an attorney to represent the minors does not supersede the guardian's rights: *Estate of Rose*, 66 Cal. 241; 5 Pac. Rep. 220. The reversal of a decree of settlement vacates it, and any person interested in the estate may subsequently appear in the lower court and file exceptions to the account: *Estate of Rose*, 66 Cal. 241, 242; 5 Pac. Rep. 220. The circumstance that attorneys, suing for professional services rendered, filed exceptions to the executor's account is unimportant. They are not interested in such account, have no right to contest it, and the filing of exceptions could not give them any interest: *Briggs v. Breen*, 123 Cal. 657; 56 Pac. Rep. 633, 635. The attorney of an executor or administrator cannot file exceptions to an account presented for settlement, for he is not a "person interested in the estate," and it is such persons only who are entitled to file exceptions to an account. Hence exceptions filed by such attorney are ineffectual for any purpose: *Estate of Kruger*, 143 Cal. 141, 145; 76 Pac. Rep. 891. Any person interested may appear, and, by objections in writing, contest any account or statement therein: *Estate of Adams*, 131 Cal. 415, 417; 63 Pac. Rep. 838. When the account is presented for settlement after due notice, any creditor or person interested may contest the same, and may object to any item of charge, or credits, or to any claims allowed and not passed upon on the settlement of any previous account, and may thereupon have his objection settled and determined: *Estate of McDougald*, 146 Cal. 191, 194; 79 Pac. Rep. 878. Those interested in the estate undoubtedly have the right to show that services, for which the executor or administrator claims that allowances should be made to him from the estate, have been so negligently performed as to cause damage to the estate, and, consequently, that the estate should not pay therefor, as in the case of professional services rendered by attorneys: *Estate of Kruger*, 143 Cal. 141; 76 Pac. Rep. 891, 893.

(4) **Contest of allowed claim.** An allowed claim may be contested at the settlement of a final account of the administrator, if such claim has not already been passed upon on the settlement of a former account, or on rendering an exhibit, or on making a decree of sale, and the party contesting such claim is entitled to an exception to any adverse ruling of the court: *Estate of Hill*, 62 Cal. 186, 187. The individual claim of an administrator against the estate is not conclusive, but may be contested by interested parties when the administrator's account is presented: *In re Barker's Estate*, 26 Mont. 279; 67 Pac. Rep. 941, 942. There are at least two points in the administration of an estate at which an approved claim may be contested; namely, when the application is made for the sale of property, and when an account is rendered for settlement; but, in making the contest, the contestant has the affirmative, and must show cause: *Estate of Loshe*, 62 Cal. 413, 415. The allowance of a claim has the effect

only of placing the claim among the acknowledged debts of the estate, to be paid in due course of administration. It is not conclusive upon the heirs or others interested in the estate, but the right is still reserved to them, upon presentation of the account, to contest and have it rejected: *In re Barker's Estate*, 26 Mont. 279; 67 Pac. Rep. 941, 942.

(5) **Manner of stating objections. Facts.** Objections to an account may be stated in the most general language, although the probate court may require them to be made more specific. Under a general objection to any and all of the items, the court can inquire into and scrutinize the account, and is not bound by the executor's oath thereto, or by the vouchers produced by him; and, in examining it, he may, for his information, allow any person to point out errors and defects therein: *Estate of Sanderson*, 74 Cal. 199, 205; 15 Pac. Rep. 753. One who files an opposition to the settlement of the final account of an executor or administrator, and to a decree of distribution, on the ground that he has contingent claims against the estate, must state, in his opposition, facts showing that such claim exists: *Estate of Halleck*, 49 Cal. 111, 116.

(6) **Purpose of statute. Practice. Pleadings. Issues.** The purpose of the statute in allowing any person interested to appear and file his exception in writing to the account, and to contest the same, is, that an issue shall be made in the trial court as to the items contested, or with which it is sought to charge the administrator. It is intended that the administrator shall know the items contested, or the matters in regard to which he is claimed to have been delinquent, so that he may come into court with his evidence, prepared to meet or to explain any exceptions to his account. The issues are thus made by the verified account and the written exceptions filed to it. The method is simple, and is designed to save the time of the court being taken up by uncontested matters: *Estate of Sylvar*, 1 Cal. App. 35, 37; 81 Pac. Rep. 663. The account, and the objections thereto, represent the pleadings of the parties, and the issues to be tried are to be determined therefrom. The objector is required to specify with convenient detail the particular items to which he takes exception, and to state any matters of fact attending them, upon which reliance is had for attaching liability to the executor; and there is no good reason for going beyond this convenient practice, and requiring a technical reply of the executor or administrator whereby he must deny or avoid a matter stated by the objector, as by the rules of pleading adapted to ordinary suits or actions: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 610. The requirement of the statute, that one who objects to a final account shall indicate the precise exceptions relied upon, was evidently designed, in the system of pleading, as an answer con-

troverting the statements of facts contained in the final account, which is treated as a complaint, and such objections are apparently intended to impart notice to the personal representative of the decedent so as to enable him to prepare for a trial of the issues thus framed. The court's examination of the facts challenged by the exception is therefore limited to the particular specifications set forth in the objections interposed: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 123. When persons, claiming to be heirs, file objections to the final account of an executor or administrator, they are entitled to have such objections disposed of in an orderly and legal manner, and not to be summarily dismissed on motion of the administrator on the mere assumption, without proof, that they are not in fact heirs of the deceased. The issue tendered by them is one of fact, and should be so considered and determined by the evidence regularly offered and submitted: *In re Ollschlager's Estate* (Or.), 89 Pac. Rep. 1049, 1050.

(7) **Additional or amended exceptions.** In objecting to the final account of an executor or administrator, the legatees are not limited to their original objections, but may file additional or amended exceptions, at any stage of the proceedings, to modify or enlarge their demand so as to make it correspond with the testimony produced: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 126. It is proper practice to extend to contestants the widest latitude in amending and supplementing their exceptions: *Estate of Sanderson*, 74 Cal. 199, 210; 15 Pac. Rep. 753.

(8) **Untenable objections.** It is not a valid objection, for an executor or administrator to make, that one of the persons filing objections to his account was not shown to be a "person interested": *Estate of Pease*, 149 Cal. 167; 85 Pac. Rep. 149, 151. It is not a valid objection, where one claims a legacy, on the final settlement of the account of an executor, that the statute of limitations has run against the claimant, for the reason that he is not named in the will, and that it would require extrinsic evidence to enable the court to recognize him as the legatee. If the legatee is not named or described in the will, then he has no right to the legacy at all, and no amount of extrinsic evidence can create a right to it. On the other hand, if he is named or described in the will, no matter how defective the designation may be, he stands on an equal footing with all other devisees, and any circumstance which will prevent the statute from running as to them will prevent the statute from running as to him: *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643; 72 Pac. Rep. 502, 503. It is not a valid objection to the validity of the final account of an executor or administrator that certain property belonging to the estate was not appraised by the executor, where it appears

that all the property received, or that which would by reasonable diligence have been received, has been accounted for: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 610. An objection, urged to the final accounting of the executor, that proof of publication of notice to creditors was made by the publisher, and not the printer or his foreman, and was not filed within six months, is untenable. The statute requiring such notice is for the benefit of those having claims against the estate, that they may be informed of the appointment of the executor or administrator, and of the time and place of the presentation of demands to him. But it is in no sense a prerequisite to his entering upon the discharge of his duties: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 609. It is not a matter pertinent for inquiry upon a final accounting, whether the sales of realty have been authorized and regularly made with a view of determining their validity. The purchaser is not ordinarily a party to the proceeding, nor is there any process by which he may be brought in, and the proceeding is wholly inappropriate for the purpose, so that a suggestion to set aside the sale is without merit: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 611. In a proceeding by an administrator *de bonis non* against the administrator and bondsmen of the first administrator of plaintiff's intestate, to require the production and filing of papers and vouchers in defendant's possession, showing the disbursements made by his intestate, an objection that the petition does not show that such defendant has in his possession property belonging to the intestate is without merit: *In re Herrin's Estate*, 40 Or. 90, sub nom. *Gatch v. Simpson*, 66 Pac. Rep. 688, 689, 690.

(9) **Evidence. Burden of proof. Presumptions.** Upon a contest of the final account of an administrator, where the exceptions are affirmative, and, so far as they relate to matters of fact or to the real objections of the contestant, constitute new and affirmative matter in opposition to the account, it is incumbent upon the contestant to introduce evidence in support of these allegations, and the administrator, in opening his case upon the account, is not required to anticipate the evidence in support of the exceptions, nor to show that the allegations in the exceptions are not true: *Estate of Vance*, 141 Cal. 624, 626; 75 Pac. Rep. 323. If objections are made to an executor's final account, that certain property sold by him was worth more than he received for it, his failure to reply to such allegation does not preclude him from showing anything to the contrary: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 610. If those who contest an administrator's account state, in their exceptions, that they are creditors of the deceased, and there is no proof, the presumption is that they are creditors: *Tompkins v. Weeks*, 26 Cal. 50, 57. The burden of showing that an executor or administrator should be charged with interest is upon the contestant of his account: *Estate of Sarment*,

123 Cal. 331, 333; 55 Pac. Rep. 1015. If an executor's final account is properly challenged, the burden of proving the truth of the item, or the reasonableness of any credit thus objected to, devolves upon him: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 124. There is no error in admitting oral testimony as to the payment of taxes where the loss of tax receipts is shown before such oral testimony is received: *Estate of Moore*, 72 Cal. 335; 13 Pac. Rep. 880, 884. If nothing further appears, the appraised value is the amount with which an executor or administrator should be charged; but it is not conclusive, and it is incumbent upon him, if there has been any loss, to show the cause thereof, so that the court can say that it was incurred without his fault, and thereby be enabled to extend him credit: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 610.

(10) **Waiver of written objections.** Written objections to an account are waived by the administrator, where he went into the hearing some time after oral objections were made in his presence and in the presence of the court, and at no time objected that the objections to the account were not made in writing: *Estate of Marre*, 127 Cal. 128, 132; 59 Pac. Rep. 385.

9. Power and duty of court.

(1) **In general.** Due notice of a proposed final settlement of an estate having been given, the probate court has jurisdiction to make the settlement, to apportion the residue of the estate among those entitled to share in it, and to order distribution: *Lewis v. Woodrum* (Kan.), 92 Pac. Rep. 306; *Toland v. Earl*, 129 Cal. 148, 155; 79 Am. St. Rep. 100; 61 Pac. Rep. 914. The court, in settling the account of an administrator, would not exceed its jurisdiction by requiring him to turn over the property to a special administratrix, where there is a dispute as to who owns the property which the administrator has in his hands at the time he is settling his accounts, but it is not disputed that the property came into his hands by virtue of his appointment as administrator: *State v. District Court*, 26 Mont. 369; 68 Pac. Rep. 856, 857. It is not error for the court, in the final settlement of an administrator's account, to adjudicate upon certain items, such as clerk's fees and the like, in anticipation of payment: *Estate of Parsons*, 65 Cal. 240, 241; 3 Pac. Rep. 817. The pendency of an action brought by an attorney for the recovery of his fees is no ground for the court's declining to approve the final report of the executor and ordering his discharge: *Hallett v. Lathrop*, 20 Col. App. 212; 77 Pac. Rep. 1096, 1097. The failure of an executor or administrator to apply for an order requiring a surviving partner to account is no reason why the court should refuse to settle an annual account of the administrator or executor, which is intended only to show what property has been received by him, and what he has done with it:

Miller v. Lux, 100 Cal. 609, 614; 35 Pac. Rep. 345, 639. The statute relating to accounting and settlements of executors and administrators applies to special administrators, so that it becomes the duty of the judge to hear the report, and account or exhibit, of the property of the estate received by a special administrator, and of payments made by him as such, and of issues raised by objections thereto: *French v. Superior Court*, 3 Cal. App. 304, 306; 85 Pac. Rep. 133, 134. In settling the accounts of the administrator, and in ascertaining the distributive shares of those entitled to succeed to the estate of a deceased person, and in adjudging what shall satisfy the decree of distribution, the superior court, in the exercise of its probate jurisdiction, proceeds upon principles of equity, and may so frame its judgments as to do exact justice in regard to all matters properly entering into the account of the administrator, and which, in the application of equitable rules, affect the distributive shares of the estate: *Estate of Moore*, 96 Cal. 522, 528; 32 Pac. Rep. 584. An error in settling the account of an executor or administrator may be corrected at the instance of any one interested: *Estate of Moore*, 96 Cal. 522, 524, 526; 32 Pac. Rep. 584. A probate court can settle the accounts of executors or guardians only in the manner prescribed by the code: *Reither v. Murdock*, 135 Cal. 197, 201; 67 Pac. Rep. 784.

(2) **As to notice.** It is the duty of the court to ascertain whether proper notice has been given before allowing the account, and the statute directs that the decree shall show that proof thereof was made to the satisfaction of the court; and when proper notice has been given and so shown, the recital thereof in the decree is made conclusive evidence of the fact, subject, of course, to review on appeal in a proper manner: *McClellan v. Downey*, 63 Cal. 520, 523. Whether additional notice shall be given or not is a matter within the discretion of the court below, and, in the absence of anything to show that such discretion has been abused, the appellate court will not interfere: *In re Jessup*, 81 Cal. 408, 437; 6 L. R. A. 594; 21 Pac. Rep. 976; 22 Pac. Rep. 742, 1028.

(3) **To scrutinize accounts.** It is the duty of the court to scrutinize carefully the account, and to reject all claims of the executors or administrator which are in themselves illegal or unjust in fact: *Estate of Sanderson*, 74 Cal. 199, 210; 15 Pac. Rep. 753; *Estate of Kennedy*, 120 Cal. 458, 462; 52 Pac. Rep. 820; *Estate of More*, 121 Cal. 635, 639; 54 Pac. Rep. 148; *Estate of Franklin*, 133 Cal. 584, 587; 65 Pac. Rep. 1081; *Estate of Willey*, 140 Cal. 238, 243; 73 Pac. Rep. 998. The probate court has the power to determine whether items of expenses of administration were properly incurred or not: *Dodson v. Nevitt*, 5 Mont. 518; 6 Pac. Rep. 358, 360. The court has power to examine, and to allow or to disallow, any items in the account, even though

there is no contest; and if it were brought to the knowledge of the court that the executor had failed to charge himself with money or property belonging to the estate, it would be the duty of the judge to examine the matter of his own motion: *Estate of Sanderson* (Cal.), 13 Pac. Rep. 497; *Estate of Sanderson*, 74 Cal. 199; 15 Pac. Rep. 753. The court is not bound by the statement, in the petition of an applicant to contest the account, that he has any interest in the estate, but may take testimony as to whether he has any interest: *Garwood v. Garwood*, 29 Cal. 514, 520. The court, on a proceeding for the settlement of the account of an executor, has power to examine him touching any and all items of account, and to base its decree of settlement upon such examination, notwithstanding that no person interested in the estate has filed specific exceptions to which the examination is appropriate: *Estate of Sanderson*, 74 Cal. 199, 202; 15 Pac. Rep. 753.

(4) **In absence of exceptions.** All persons interested have an opportunity, by filing written exceptions, to call the attention of the court to alleged errors or defects in an account presented by an executor or administrator; but, in the absence of exceptions, the court may, and should, inquire into any matter which may seem to it objectionable, and pass judgment thereon: *Estate of Sanderson*, 74 Cal. 199, 208; 15 Pac. Rep. 753; *Estate of Kennedy*, 120 Cal. 458, 463; 52 Pac. Rep. 820; *Estate of More*, 121 Cal. 635, 639; 54 Pac. Rep. 148; *Estate of Franklin*, 133 Cal. 584, 587; 65 Pac. Rep. 1081; *Estate of Willey*, 140 Cal. 238, 243; 73 Pac. Rep. 998. Even in the presence of specific objections, the court is not limited to the specific objections: *Estate of Sanderson*, 74 Cal. 199, 208; 15 Pac. Rep. 753.

(5) **Report of referee.** The report of the referee of an account of an executor or administrator is merely advisory to the court. If the court is not satisfied from the evidence adduced before the referee that the findings and recommendations of the referee were correct and proper, it may take further testimony, and make its own findings and conclusions. The report and findings of the referee may be adopted, modified, or disapproved altogether, as the court may see fit, especially where the reference is only for the purpose of examining the account of the executor and objections thereto and making report thereon: *In re Courtney's Estate*, 31 Mont. 625; 79 Pac. Rep. 317, 319.

(6) **To compel accounting.** An executor or administrator may be directed by the probate court to render a full account of his administration, and the authority of the court to enforce obedience to such order is not doubted: *Magraw v. McGlynn*, 26 Cal. 421, 430. In a proceeding to compel an executor or administrator to pay to an heir his distributive share, the power of the court is not limited to the specific property or the amount awarded by the decree. It has juris-

diction to take an account, or to award an interest according to equitable principles: *Estate of Clary*, 112 Cal. 292, 294; 44 Pac. Rep. 569. The probate court has competent authority to make all necessary orders to compel an accounting of personal property belonging to the estate of the testator, whether it be such as the testator owned at the time of his death, or is the profits of other property of the estate sold by the executor. That court also possesses competent power to compel an accounting in respect to property which it is alleged the executor has converted to his own use: *Auguisola v. Arnaz*, 51 Cal. 435, 438. The personal obligation of an executor or administrator, who has been guilty of a devastavit, is to be enforced by a resort to the court which settled the account: *Washington v. Black*, 83 Cal. 290, 295; 23 Pac. Rep. 300. The court may compel an executor or administrator, even if he has resigned his trust, to account for the estate to the value of personal property converted by him which he had neglected to include in his prior accounts: *Estate of Radovich*, 74 Cal. 536, 539; 5 Am. St. Rep. 466; 16 Pac. Rep. 321. The probate court has the power, and it is its duty, to require a full and final accounting, and to make a settlement with an executor, who has resigned, been removed, or whose letters have been revoked, and to order him to deliver the personal effects and assets of the estate to his successor: *Hudson v. Barrett*, 62 Kan. 137; 61 Pac. Rep. 737. The provisions of the statute requiring guardians to account annually, and oftener, if required by the probate courts, clearly refer to accounts to be rendered during the lifetime of the guardian and the minority of the ward; but where the guardian dies before making a settlement, and long after his ward's majority, his executors, having received no assets of the ward, cannot be compelled by the probate court to make a settlement of the estate of the said ward. The guardianship has terminated; the probate court has lost its jurisdiction; and the presentation of such settlement is no part of the duties involved in the administration of the testator: *Harris v. Calvert*, 2 Kan. App. 749; 44 Pac. Rep. 25. The probate court has no authority to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator: *Bush v. Lindsey*, 44 Cal. 121, 124.

(7) **Striking. Combining. Making more specific.** Where payments have been made to general creditors without authority of the court, they are made at the peril of the administrator. Hence if exceptions are filed to the account, and it appears that the sufficiency of the assets for the payment of all the debts is doubtful, it is the duty of the court to strike out such payments, with leave to charge them in a future account if the estate should prove solvent, or to the extent of their pro rata share if the estate should prove insolvent: *Estate of Fernandez*, 119 Cal. 579, 582; 51 Pac. Rep. 851. If the

first account of an executor or administrator is not sufficiently specific, the court clearly has the power to require the administrator to make it more specific; and if, pending the settlement of such account, the administrator presents a second account, it is not only the right, but it is also the duty of the court to require the two accounts to be combined into one, so as to present a full and complete showing of the administration up to the time of the rendition of such combined account. Where the circumstances of the estate are such that one account will result in saving expenses, and in more clearly presenting the accounts of the representative of the estate, it is not only the right, but it is also the duty of the court to require the one account: *Hirschfeld v. Cross*, 67 Cal. 661, 662; 8 Pac. Rep. 507. If an account filed is defective, the court may require it to be made more specific: *Hirschfeld v. Cross*, 67 Cal. 661; 8 Pac. Rep. 507.

(8) **Want of jurisdiction.** A court has no jurisdiction to settle prematurely the account of an executor or administrator. It should not attempt to settle such account before the same is filed. If the court undertakes to direct the dismissal of an action brought by the administrator upon a claim alleged to be due the estate, and to find thereupon that there is no property in the hands of the administrator, it undertakes both to state and to settle his account to that extent. It determines his rights in that regard, and settles, or attempts to settle, his account as effectually as if the order had been made after the administrator had filed an account. This the court cannot do: *Estate of Bullock*, 75 Cal. 419, 421; 17 Pac. Rep. 540. As a probate court has no power to take cognizance of the differences existing between the administrator and heirs and claimants in their individual capacities, the administrator cannot claim an offset of a debt due him, against a creditor or distributee of the estate, and the court has no jurisdiction to pass upon the administrator's right to make such a set-off: *Dray v. Bloch*, 29 Or. 347; 45 Pac. Rep. 772, 774. The probate court has no authority to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was the administrator: *Bush v. Lindsey*, 44 Cal. 121, 124. Neither has it power, after the term at which a final order has been made, approving the accounts of the administrator, to confirm a "supplementary account," without notice to the distributees, which supplementary account is in itself a radical modification of the final account: *Dray v. Bloch*, 29 Or. 347; 45 Pac. Rep. 772, 774. Nor has the court any power to order an administrator to pay the balance of the estate into court, and that he thereupon be discharged: *Estate of Sarment*, 123 Cal. 331, 337; 55 Pac. Rep. 1015. The administrator is answerable for the assets in his hands, and, so long as he remains in office, is entitled thereto under the directions of the court. Upon the entry of an order for the payment of the claims against the estate, the

administrator becomes liable therefor to the creditors, both personally and upon his bond, and each creditor is entitled to an execution against him therefor. He cannot escape this liability by complying with an order which the court had no power to make: *Estate of Sargent*, 123 Cal. 331, 337; 55 Pac. Rep. 1015. A probate court, in the settlement of an account, has no jurisdiction to declare an executor's deed to real estate to be valid, where no proceeding for the confirmation of said sale has ever been made: *Richards v. Richards*, 36 Cal. Dec. 369, 376 (Nov. 4, 1908).

10. **Administrator to be charged with what. In general.** An executor or administrator is chargeable not only with the assets which come into his possession, but also with those which it was his duty to have taken into possession, and which, by negligence, he has failed to collect: *Estate of Kennedy*, 120 Cal. 458, 461; 52 Pac. Rep. 820. In the settlement of his final account, he is to be charged with a personal debt due from him to the decedent as money on hand: *Estate of Walker*, 125 Cal. 242, 249; 73 Am. St. Rep. 40; 57 Pac. Rep. 991; *Estate of Miner*, 46 Cal. 564, 570. Under the statute of Oregon, an executor, though insolvent, is bound to account for a debt due from him to the estate, and shall be charged therewith on the settlement of his final account as for so much money in his hands from the time the claim became due and payable: *Davisson v. Akin*, 42 Or. 177; 70 Pac. Rep. 507, 508. An executor or administrator has no right to occupy and use premises belonging to the estate for a series of years for his own profit, and without accounting for the value of such use. It is as much his duty to pay a reasonable rental for the property as it would be his duty to collect and to account for the rent if the property had been leased to a stranger to the estate. Hence if he uses realty of the estate as his own, he must account for rental: *In re Alfstad's Estate*, 27 Wash. 175; 67 Pac. Rep. 593, 598. An executor or administrator is chargeable with the value of real property lost to the estate by his neglect to pay the taxes thereon: *Estate of Herteman*, 73 Cal. 545; 15 Pac. Rep. 121, 123. So if he commences a suit to recover property of the estate, but abandons the suit without good reason therefor, and allows the defendant therein to keep the estate on payment to plaintiff of money, which the plaintiff retains for himself, the executor or administrator is chargeable with the value of the property, if lost to the estate: *Estate of Pease*, 149 Cal. 167; 85 Pac. Rep. 149, 151. An executor or administrator should be charged with interest on money of the estate which he has drawn and mingled with his own funds and omitted from his account: *Estate of Herteman*, 73 Cal. 545, 547; 15 Pac. Rep. 121. An executor or administrator is chargeable with money lost to the estate through his negligence, though he does not thereby forfeit his statutory right to commissions. He should be

charged with such loss in his account, but be credited with his commissions: *Estate of Carver*, 123 Cal. 102, 104; 55 Pac. Rep. 770.

REFERENCES.

Charging administrator with interest: See note § 655, head-line 4, ante.

11. Administrator not chargeable when. An executor or administrator will not be charged with the appraised value, but with the amount received only, though his final report does not show that he has disposed of and accounted for all the goods that came into his possession, if his testimony as a witness shows that he did dispose of and account for all the property that came into his possession, and such testimony is corroborated by his final report, which shows that he received, on account of sales, very nearly the appraised value of the property: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 524. An executor or administrator cannot be charged with debts or choses in action, he cannot be charged with money retained under a claim of right, but, of course, if the administrator should lose the right to recover such money by neglecting to bring an action for its recovery before the right to do so is barred by the statute of limitations, he would then properly be chargeable with the loss: *In re Beam's Appeal*, 8 Kan. App. 835; 57 Pac. Rep. 854, 855. If an executor or administrator uses diligence in trying to collect claims due the estate, but is unable, owing to the financial condition of the debtors, to collect in full, and he rebates from a claim by way of compromise, he should not be charged with the amount rebated, where the debtor is apparently insolvent: *In re Ricker's Estate*, 14 Mont. 153; 35 Pac. Rep. 960, 967. So where it appears from his final accounting that he received for a note and mortgage all that it was reasonably worth, he is not to be charged with the difference between such sum and the appraised value of the note and mortgage: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 610. An executor or administrator should not be charged for the use and occupation of his decedent's land after a sale of the premises by the sheriff under a foreclosure sale; because from that time the purchaser at the sale becomes entitled to the value of the use and occupation, and, after such sale, the estate, and the parties interested therein, have no claim to the value of the use and occupation: *Walls v. Walker*, 37 Cal. 424, 431; 99 Am. Dec. 290.

12. Administrator is entitled to credit for what.

(1) **In general.** It is error to reject unchallenged items on the credit side of the final account of an executor or administrator: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 123. He is entitled to credit for moneys advanced to distributees and legatees to the full extent of

payments made to them, whether ordered by the court or not. These payments should be charged to the distributive shares: *Estate of Moore*, 96 Cal. 522, 529; 31 Pac. Rep. 584. He may be allowed money paid for releasing animals belonging to the estate, from a lien for pasturage, where he acts in good faith and for what he deems to be the best interest of the estate; and he cannot be legally charged with a loss arising from a sale of the animals for less than the amount of the lien paid by him, unless it is made to appear that he has been guilty of negligence, and did not use ordinary care and diligence in connection with the matter: *Estate of Armstrong*, 125 Cal. 603, 605; 58 Pac. Rep. 183; *Estate of Freud*, 131 Cal. 667, 671; 82 Am. St. Rep. 407; 63 Pac. Rep. 1080. If an executor or administrator carries on his intestate's business, and charges himself with the gross profits of the business, and the court debits him with the amount thereof, he should be allowed money paid out in the course of the business: *Estate of Rose*, 80 Cal. 166, 178; 22 Pac. Rep. 86. It is proper to allow to an executor or administrator an item of expenses in procuring a surety company to go upon his bond, though the authority of the executor or administrator is afterwards revoked for irregularities, where the statute expressly authorizes him to include, as a part of the lawful expenses of executing his trust, such reasonable sum as may be paid to a company, authorized under the laws of the state to become such surety: *Rice v. Tilton*, 14 Wyo. 101; 82 Pac. Rep. 577, 580. If he acts in good faith, he is entitled to credit for reasonable disbursements and commissions, although his order of appointment is voidable: *Rice v. Tilton*, 14 Wyo. 101; 82 Pac. Rep. 577, 581; *In re Owens' Estate (Utah)*, 91 Pac. Rep. 283, 285. An executor or administrator may be allowed reasonable and necessary costs for prosecuting appeals to the supreme court, where no mismanagement or bad faith on his part is shown: *In re Davis' Estate*, 33 Mont. 539; 88 Pac. Rep. 957, 958. If, pending the administration of an estate, a mortgage is given thereon by authority of the court, and a part of the land is afterwards sold, and the other part is set aside as a probate homestead for the minor children, and the mortgagee demands payment of a certain sum of money before he will release the tract sold, and the administrator pays the sum demanded, the court, in proceedings for the settlement of the final account, is authorized to make allowance for the payment so made: *Estate of Shively*, 145 Cal. 400; 78 Pac. Rep. 869, 870. Although an order has been made *ex parte* and without notice, yet, if the items are proper ones for allowance under the law, a *nunc pro tunc* order may be made at the hearing of the objections to such order, covering the same items included in the former order: *In re Murphy's Estate*, 30 Wash. 9; 70 Pac. Rep. 109, 110. That which is a proper charge in favor of an administrator cannot be collected otherwise than by his retention of the property until such charge is paid: *Huston v. Becker*, 15 Wash. 586; 47 Pac. Rep. 10, 11.

The fact that heirs, legatees, and creditors are expressly permitted to contest matters not included and passed upon in any former account necessarily implies that the administrator is not precluded from going behind a former account, and bringing forward charges which, through inadvertence or oversight, may have been omitted: *Walls v. Walker*, 37 Cal. 424, 426; 99 Am. Dec. 290.

REFERENCES.

Right of executor or administrator to credit for amount paid to a surety company for going on an administration bond: See note 48 L. R. A. 591-592.

(2) **Payments made for preservation or protection of estate.** It is a cardinal principle, that, subject to the contingency of the expense being disallowed by the court, an executor or administrator may do whatever is necessary for the preservation of the property of the estate, and the specific character of the act done is altogether immaterial. For such purpose, he may pay off liens existing on the property; he may also spend money in litigation, either to protect or to recover property of the estate, or for insurance; and while he may not expend money in the erection of a new building, yet he may expend it in repairs to any extent necessary to preserve the property; and, in case that may be readily imagined, power to repair might extend even to the erection of a new building; as, in the case of a necessary outhouse destroyed by fire, or of land paying a large rental on which the building had been destroyed by fire, or decayed so as to be no longer available, and where the new building could be paid for in a very short time out of the rental. As trustee for the estate, he may redeem the property thereof from the lien of a mortgage made by decedent, though not presented as a claim against the estate, and may charge the expense to the estate: *Estate of Freud*, 131 Cal. 667, 673; 82 Am. St. Rep. 407; 63 Pac. Rep. 1080. But the power of the administrator to pay off encumbrances in any case results solely from the necessity of preserving the property, and can be justified only on the ground that the lien is a charge on the estate, and therefore a peril to it; and this is equally true, whether the lien was created by the intestate, or, as in the case of taxes, in some other way: *Estate of Freud*, 131 Cal. 667, 672; 82 Am. St. Rep. 407; 63 Pac. Rep. 1080. Certain disbursements for the repair of a house should be allowed to an executor or administrator, although, as an heir, the house may become his property, where the property was inventoried and accounted for as property of the estate, and the administrator charged himself with the rents, which amounted to sums at least one half the sum expended for repairs, and where there has been no order transferring dominion over the property to the administrator individually, and there has been no distribution of

the estate: *Rice v. Tilton*, 14 Wyo. 101; 82 Pac. Rep. 577, 580. If it is absolutely essential for the protection of an estate, and the preservation of its property, that the representative should advance money as for the expenses of litigation, and he does so, thereby producing benefit to those interested therein, it is only equitable that he should be fully reimbursed: *Estate of Carpenter*, 146 Cal. 661; 80 Pac. Rep. 1072, 1074.

(3) **Same. Necessary expenditures.** An executor or administrator should be allowed, in the settlement of his account, for wages paid for the protection of the estate: *Estate of Miner*, 46 Cal. 564. An executor or administrator is entitled to credit for taxes paid on the property of a decedent; and the probate court may, under a proper petition, adjust the rights of heirs who are equitably entitled to reimbursement for taxes paid by them, or those under whom they claim: *Estate of Heeney*, 3 Cal. App. 548, 553; 86 Pac. Rep. 842. Where the expenditure is for the benefit of the estate, and is necessary, and is for services which it is the duty of the administrator to perform, but which he cannot himself perform, it is within the discretion of the judge to make an allowance to the administrator for such expenditures, as where a broker has been employed on commission to make a sale of real estate. No rule can be laid down which shall catalogue the various kinds of these expenses, or classify them. Much will depend upon the nature of the estate and the character of the services for which the charge is made: *Estate of Willard*, 139 Cal. 501, 506; 73 Pac. Rep. 240; 64 L. R. A. 554. While expenditures made by an executor or administrator upon the estate he represents for permanent improvements upon the property in the way of erecting new buildings and structures will not be allowed, yet, if the repairs and improvements are absolutely necessary to keep the premises in good tenable condition, it would be very inequitable to hold that the representative is not entitled to reimbursement: *Estate of Clos*, 110 Cal. 494; 42 Pac. Rep. 971. An executor or administrator is entitled to credit for rent paid under a valid agreement with the representative: *Estate of Dunne*, 58 Cal. 543, 548. "Executors and administrators are allowed, as proper credits in their accounts, all disbursements made in good faith for any liability of the estate, either arising in the course of administration, or existing against the deceased at the time of his death, and paid in the manner prescribed by law": *Estate of Willard*, 139 Cal. 501, 506; 73 Pac. Rep. 240; 64 L. R. A. 554, quoting from 2 Woerner's American Law of Administration, sec. 514.

(4) **For costs paid.** An executor or administrator is entitled to credit for costs paid on the foreclosure of a mortgage given to his intestate, where he becomes the purchaser at a sum too small to

satisfy the mortgage and costs: *Estate of Miner*, 46 Cal. 564, 571. While an executor or administrator is individually answerable for costs, where a judgment has been recovered against him, yet they should be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or resisted without just cause: *Hicox v. Graham*, 6 Cal. 167, 169; *Estate of Miner*, 46 Cal. 564, 570.

(5) **Funeral expenses. Last illness.** The proper expenses of the disposition of the body of a deceased person is a proper charge against his estate, but neither the court in probate nor the personal representative has any right to the body of the deceased, nor any right to control the manner of disposition of the remains, nor to dictate the place of interment. The duty and the right of burial are quite different things from the duty and the right of auditing and paying the expenses of such burial: *O'Donnell v. Slack*, 123 Cal. 285; 55 Pac. Rep. 906, 907. Funeral expenses are proper charges against the distributive shares of an estate coming to adult children, but subject to the debts of the estate. If they have no estate from which the items can be paid until the estate is settled, and their distributive shares are ready to be apportioned, the court should see that the executor or administrator is paid the amount of these items from such distributive shares, if there be such at the final settlement of the estate, especially where the expenditures, being first charges against the respective estates of the children for whom they were made, were advanced by the executor or administrator at the time when humanity demanded it. In such a case he should be reimbursed before the distributive shares are otherwise distributed: *In re Murphy's Estate*, 30 Wash. 9; 70 Pac. Rep. 109, 111. The courts will allow a reasonable sum to be paid out of the funds of the estate for the erection of a monument, putting the expenditure upon the ground of funeral expenses: *Estate of Koppikus*, 1 Cal. App. 84; 81 Pac. Rep. 732, 733. With respect to funeral expenses of decedent, courts generally take into consideration all the circumstances of the case, and when executors have acted with ordinary prudence, they are not held personally liable, although the sums paid therefor may seem large: *Estate of Millenovich*, 5 Nev. 161, 182. The expenses of the last illness of the decedent cannot be regarded as extravagant when they are not in excess of the customary charges therefor: *Estate of Millenovich*, 5 Nev. 161, 182.

(6) **Payment of family allowance.** In the matter of paying a family allowance, the administrator is not required to wait for an order of court, but may make the necessary expenditures as the exigencies occur, and the court will allow such sums as may be reasonable in the settlement: *Estate of Lux*, 100 Cal. 606, 607; 35

Pac. Rep. 345; 114 Cal. 89, 90; 45 Pac. Rep. 1028; *Crew v. Pratt*, 119 Cal. 131, 138; 51 Pac. Rep. 44. And the fact that the widow received other moneys from other property of the deceased does not preclude the court from sanctioning the disbursements by the executors for her support, where the court finds that, taking that fact into consideration, the allowance paid by the executors was reasonable, and properly advanced to the widow as a family allowance for her use and support: *Estate of Lux*, 114 Cal. 89, 90; 45 Pac. Rep. 1028. The production of a voucher from the widow, showing a receipt of the payment of "one thousand dollars, balance payment of the eighteen hundred dollars allowed by the court for widow's allowance," is prima facie evidence that only one thousand dollars of the allowance is then unpaid, and throws upon the contestant the burden of showing the contrary; and, in the absence of counter-proof, and with the testimony of the administrators that the whole has been paid, the court should give credit for the full amount: *Estate of Sarment*, 123 Cal. 331, 335; 55 Pac. Rep. 1015. Whether a family allowance made to an administratrix should be cut down by reason of her delay in closing the estate is a question for the lower court to determine, and, in the absence of any showing of an abuse of discretion, its decision will not be disturbed on appeal: *Estate of Freud*, 131 Cal. 667, 674; 82 Am. St. Rep. 407; 63 Pac. Rep. 1080.

(7) **Traveling expenses.** An administrator should be allowed all necessary traveling expenses when on business of the estate: *Rice v. Tilton*, 14 Wyo. 101; 82 Pac. Rep. 577, 580; and an item of traveling expenses should not be rejected in toto because the account does not disclose for what the expense was incurred, but should be retired from the list of items, with leave to bring it forward with the proper proofs in a future account. The administrator is also entitled to credit for payments made for the services and traveling expenses of his attorney, not exceeding a reasonable compensation for the labor actually performed, when the same were necessary to enable him properly to perform the duties of his trust: *Estate of Rose*, 80 Cal. 166, 178, 179; 22 Pac. Rep. 86; *Estate of Moore*, 72 Cal. 335; 13 Pac. Rep. 880. And it cannot be said that in no case should an administrator be allowed to employ a book-keeper. This may properly be left to the probate judge. He may allow it, if proper; but if the services are such as, under the circumstances, the administrator ought to have performed, and for which his commissions are intended to compensate him, such charge should be disallowed: *Estate of Moore*, 72 Cal. 335; 13 Pac. Rep. 880, 884. It is necessary, however, for him, in order to secure such allowance, to make a proper showing, accompanied by vouchers or a fit explanation of his charges. If he makes a number of trips, and the charge for each trip is made in a lump sum, he should be required to explain and identify the payments enter-

ing into the charge. This, doubtless, might be accomplished by the production of vouchers showing each payment, but items for traveling expenses, not accompanied by vouchers, will be disallowed: *Rice v. Tilton*, 14 Wyo. 101; 82 Pac. Rep. 577, 581. An administratrix is entitled to her traveling expenses necessarily incurred in her legitimate efforts to preserve the estate, and properly incurred in distributing its assets, but an order rejecting such an item will not be disturbed on appeal, except upon a claim showing that the moneys were thus necessarily and properly expended: *Estate of Byrne*, 122 Cal. 260, 262; 54 Pac. Rep. 957. Traveling expenses connected with the administration of foreign assets should not be allowed out of the assets collected in this state, but out of the foreign assets: *Estate of Ortiz*, 86 Cal. 306, 316; 21 Am. St. Rep. 44; 24 Pac. Rep. 1034.

(8) **Items for less than twenty dollars.** If an administrator swears that he has paid an item which amounts to less than twenty dollars, and no contradiction to that evidence appears, it ought to be allowed: *Estate of Rose*, 80 Cal. 166, 178; 22 Pac. Rep. 86. Where the statute provides that an executor or administrator, on the settlement of his account, may be allowed any item of expenditure not exceeding twenty dollars, for which no voucher is produced, if such item be supported by his own uncontradicted oath positive to the fact of payment specifying when, where, and to whom it was made, but that such allowance, in the whole, must not exceed five hundred dollars against any one estate, the items of expenditure by him, for which no vouchers are produced, but which may be allowed him on his accounting, are expressly limited to items each of which does not exceed twenty dollars, and not aggregating over five hundred dollars. The administrator may support his account as to an item not exceeding twenty dollars, for which he has no voucher, "by his own uncontradicted oath to the fact of payment, specifying when, where, and to whom it was made," to the extent, in all, of five hundred dollars. Beyond that limit he must support the account by vouchers, and no amount of corroboration of his oath to the expenditures, by the testimony of other witnesses, will avail to dispense with vouchers, and as to the five hundred dollars he must show when, where, and to whom the disbursement was made: *Estate of Hedrick*, 127 Cal. 184, 187; 59 Pac. Rep. 590.

REFERENCES.

Right of executor or administrator to credit for amount paid to a surety company for going on an administration bond: See note 48 L. R. A. 591-592.

13. Administrator is not entitled to credit when.

(1) **In general.** An executor or administrator is not entitled to credit for unnecessary expenditures, or for items for payments made

by the testator, or made by the executor before his appointment, for which he intentionally presented no claim, or for the costs of a wrongfully abandoned suit, or for a personal debt of the executor, or for a notice of sale of real estate which was published in the wrong county: *Estate of Pease*, 149 Cal. 167, 169; 85 Pac. Rep. 149. He is not entitled to credit for the rent of a safe-deposit box, on his own testimony that he kept therein only some papers which he could have kept safely at home: *Estate of Pease*, 149 Cal. 167, 169; 85 Pac. Rep. 149. He is not entitled to expenses incurred in procuring the removal of a guardian of a minor heir: *Estate of Rose*, 80 Cal. 166; 22 Pac. Rep. 86. Nor for money paid to a physician called as a witness in an action instituted by the administrator: *Estate of Levinson*, 108 Cal. 450; 41 Pac. Rep. 483; 42 Pac. Rep. 479. He is not entitled to credit for expenses incurred by the distributees in defending a decree of distribution: *Firebaugh v. Burbank*, 121 Cal. 186; 53 Pac. Rep. 560. An item for money paid to the partner of the deceased for losses incurred in running a hotel is properly disallowed, where there is no sufficient evidence of the item: *Estate of Herteman*, 73 Cal. 545, 547; 15 Pac. Rep. 121. So an advancement to a widow should be disallowed. The executor or administrator should look for reimbursement to the widow's distributive share on final distribution: *Elizalde v. Murphy*, 4 Cal. App. 114, 116; 87 Pac. Rep. 245, 246. An allowance for a harvester used in farming operations, voluntarily carried on by the executor at a loss, should be disallowed, but if there is no evidence or finding upon that point, the allowance will not be disturbed for the reason that such operations were voluntarily carried on by the administrator or executor: *Estate of Adams*, 131 Cal. 415, 418; 63 Pac. Rep. 838. If an executor fails to comply with the terms of the will, expenses of litigation, attorneys' fees, etc., cannot be allowed to him in the settlement of his accounts: *Estate of Holbert*, 48 Cal. 627, 630. If an executor or administrator fails to apply to the court for advice in the management of the estate, and for many years makes no report of his dealings, contrary to the requirements of the statute, it is proper to deny his claim for extra compensation, office rent, or attorneys' fees: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 127.

(2) **Improper charges.** An executor or administrator is not entitled to credit for money expended in contesting the probate of a will. Such an expense is not a proper charge against the estate: *Estate of Parsons*, 65 Cal. 240; 3 Pac. Rep. 817. An executor or administrator is not entitled to an allowance, in his account, for money paid by him in excess of the legal rate of interest, unless there is a written agreement to pay such interest above the legal rate: *Estate of Dunne*, 58 Cal. 543, 545, 549. An executor or administrator is not entitled to credit, in the settlement of his account, for any loss arising by reason of his making advances to pay off a mortgage debt upon land for which the

estate is not answerable: *Tompkins v. Week*, 26 Cal. 50, 67. Although, ordinarily, a charge for insurance of the property of the estate is legitimate, in an administrator's account, still, where a premium is charged therein amounting to nearly one fourth of the sum for which the insured property, with the land on which it stood, was sold pending administration, the court was justified in disallowing the item: *Estate of Nicholson*, 1 Nev. 518, 521. If a husband's curtesy estate gives him possession to the exclusion of the administrator, items for fencing land and for insurance on a hop-house, and other expenses for the benefit of the husband, cannot be charged to the estate: *Johnson v. Savage* (Or.), 91 Pac. Rep. 1082, 1083. Neither can an estate be charged with the balance of indebtedness claimed to be due to the executrix individually upon a note given to her for property sold by her to a lessee of the estate, who became insolvent, and returned to the property sold by her to him, and who also returned to the estate property sold to him by the estate, where there is nothing in the record to show any liability of the estate for such charge: *Estate of Adams*, 131 Cal. 415, 419; 63 Pac. Rep. 838. If the administrators of two estates join in one appeal, the expenses necessarily incurred therein are not properly chargeable to one estate. Each of the estates should bear at least one half of the expenses necessarily incurred: *In re Davis' Estate*, 33 Mont. 539; 88 Pac. Rep. 957, 959. Moneys advanced by him for the heirs' benefit are not proper charges in the settlement of his account, though they may be allowed as credits upon the distributive share of the heir when a settlement with him is made: *Estate of Rose*, 80 Cal. 166, 180; 22 Pac. Rep. 86.

(3) **Unnecessary expenditures.** Expenditures made by an administrator will not be allowed to him on the settlement of his final account, where no reasonable necessity for them is shown: *Estate of Kaiu*, 17 Haw. 514, 515. Where an executor borrows money for the use of an estate represented by him, without authority of court, and without showing any necessity therefor, it is proper to disallow a charge for interest thereon: *Estate of Millenovich*, 5 Nev. 189, 190.

(4) **Expenses before administration.** Items for payments made by an executor or administrator before his appointment, and for which he intentionally presented no claim, should not be allowed: *Estate of Pease*, 149 Cal. 167, 169; 85 Pac. Rep. 149. The law does not contemplate that the claims of an administrator for reimbursement for moneys expended before his appointment, can be established by his uncontradicted evidence, especially when such evidence, and the assignment presented as his voucher, show that, on the face of the record, the legal claim or right is in another, whose rights are not foreclosed: *Estate of Heeney*, 3 Cal. App. 548, 553; 86 Pac. Rep. 842. Where all the heirs are seeking to prevent probate proceedings, and

a payment is made for that purpose, by the heirs of an intestate, on a mortgage indebtedness owed by the latter prior to the appointment of such administrator, such payment should be disallowed, though one of the heirs is afterwards appointed administrator: *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842. Items of expenses incurred by an executor or administrator, before his application for letters of administration, are not a proper charge against the estate: *Estate of Byrnes*, 122 Cal. 260; 54 Pac. Rep. 957, 958. In contests between different executors of the same estate as to the right to administer, it is not just nor proper that the estate should be charged with the expense: *Estate of Millenovich*, 5 Nev. 161, 187.

(5) **Repairs. Protection of estate.** An executor or administrator cannot be allowed credit for payments made without the authority of the court, even to protect the estate, where a loss has occurred by the advancement made; as where he has advanced money to pay off a mortgage debt upon land, for which debt the estate is not answerable: *Tompkins v. Weeks*, 26 Cal. 51, 60; *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842. A payment made without authority, to release the mortgage, should not be allowed to the administrator: *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842. Moneys expended by an executor or administrator in the execution of an addition to a hotel belonging to the estate, or to improve it, for the benefit of the heirs, should not be allowed: *Estate of Moore*, 72 Cal. 335; 13 Pac. Rep. 880, 884. If an executor or administrator is unsuccessful in resisting the revocation of the probate of a will, he is not, as a matter of right, entitled to his costs incurred in that contest. The court is vested with a discretion to determine whether he shall be charged with them, or whether the estate shall bear them. Before the estate can be charged with the costs of the contest, the court should be in a position to know whether or not the contest was waged by the executor in good faith, with a reasonable belief that the attack on the original probate was unjustified. Hence items of expenses, in his account, for the services of experts in handwriting, to determine the validity of a second will, should not be allowed, and should be retired for future determination, when it can be found whether such costs should be charged against the executors or be borne by the estate: *Estate of Dillon (Cal.)*, 87 Pac. Rep. 379, 380.

14. **Final and intermediate accounts. Waiver.** All intermediate accounts are only to inform the court and interested parties of the receipts and disbursements and changes in the property from time to time, and it is not the intention of the law that the executor or administrator should in every account give a full inventory of the assets of the estate. This properly belongs to the inventory which is filed, except the actual cash on hand, which the law appears to contemplate

he should carry forward in his several accounts rendered to the court: *In re Davis' Estate*, 31 Mont. 421; 78 Pac. Rep. 704. A final account is one made with a view to the immediate distribution of the estate: *Estate of Grant*, 131 Cal. 426, 429; 63 Pac. Rep. 731. There is nothing which precludes an executor or administrator from bringing forward, in a succeeding annual account, or in his final account, such charges in his favor as may have been refused allowance at some former accounting, merely because the administrator fails, from any cause, to produce the technical proof required by the statute. He may include, in a subsequent account, charges admitted to be legal, but not allowed, and by producing vouchers have them allowed: *Walls v. Walker*, 37 Cal. 424, 426; 99 Am. Dec. 290. The semiannual return required by the statute of a public administrator is not to be treated as an account stated. It is not made to the court; there is no hearing upon it; and no order of the court is required as to it. It is wholly different from the accounts required to be made by an administrator, and for a wholly different purpose. It is not intended to, and does not, take the place or serve the purpose of the semiannual account required of the executor or administrator after his appointment: *Estate of Hedrick*, 127 Cal. 184, 188; 59 Pac. Rep. 590. In a case where the widow is the executrix and the sole beneficiary of the estate, and the debts are all paid, there is no necessity for a final accounting, and she is entitled to waive the rendition and settlement of such account; and the statement that she has filed no accounts as executrix, because she is entitled to have the whole of the residue distributed to her, constitutes a waiver of an account: *Middlecoff v. Superior Court*, 149 Cal. 94, 97; 84 Pac. Rep. 764.

15. Failure to settle. The obligation of an executor or administrator to account is continuous, and does not become barred by the statute of limitations. The right to demand an account may be asserted as long as the duty to render it remains unperformed: *Estate of Sanderson*, 74 Cal. 199, 215; 15 Pac. Rep. 753. If he is guilty of great delay, without satisfactory explanation, in accounting, he is properly chargeable with legal interest: *Estate of Sanderson*, 74 Cal. 199; 15 Pac. Rep. 753; *Estate of Hilliard*, 83 Cal. 423, 428; 23 Pac. Rep. 393. It is the duty of executors and administrators to account within a reasonable, or the statutory time, and a neglect to account which results in waste renders them liable, the same as in case of a failure to collect debts before the statute of limitations has run against them: *Estate of Osborn*, 87 Cal. 1, 8; 11 L. R. A. 264; 25 Pac. Rep. 157. The failure, however, of an executor or administrator to make a final settlement of the estate does not preclude those who wish to contest his final account from being heard: *Estate of Misamore*, 90 Cal. 169, 171; 27 Pac. Rep. 68. Insolvency does not relieve him of the burden of accounting for the property of the estate in his possession. He cannot

repudiate his trust entirely by his mere failure to account: *Estate of Sanderson*, 74 Cal. 199, 216; 15 Pac. Rep. 753. If creditors charge him with neglect for having money on hand for an unreasonable time, which should have been distributed or paid to creditors, and it does not appear that he had wilfully or negligently caused the delay which is occasioned by litigation, and no disobedience appears to the order of court, all presumptions are in favor of the regularity of the management of the estate, and it is incumbent upon the party alleging such neglect to prove it: *Estate of Sylvar*, 1 Cal. App. 35, 37; 81 Pac. Rep. 663. The facts that an administrator of a deceased person filed an inventory of the personal property belonging to the estate, and failed at any time thereafter to make an annual or final settlement of the estate prior to his death, which occurred seven years afterwards, do not alone show a wrongful conversion of such estate, or any part thereof, by the administrator, to his own use. A failure to perform an official duty at the precise time required by law is not necessarily any evidence, much less conclusive evidence, of a purpose wrongfully to convert and to misapply trust funds: *Allen v. Bartlett*, 52 Kan. 387; 34 Pac. Rep. 1042, 1043.

16. Death or absconding before accounting. If an executor or administrator dies before rendering an account, a court of equity alone, in the absence of any statute on the subject, has jurisdiction of accounts against the administrator of the administrator to settle the account of his intestate with the estate of which he was administrator: *Estate of Curtiss*, 65 Cal. 572; 4 Pac. Rep. 578; *Chaquette v. Ortet*, 60 Cal. 594; *Wetzler v. Fitch*, 52 Cal. 638; *Bush v. Lindsey*, 44 Cal. 121; *In re Herren's Estate*, 40 Or. 90, sub nom. *Gatch v. Simpson*, 66 Pac. Rep. 688. The probate court has no authority to cite the administrator of an administrator to settle the account of his intestate with the estate of which he was administrator: *Bush v. Lindsey*, 44 Cal. 121, 124; and it has no jurisdiction to receive or to act upon an account presented by an executor of an executor against the estate of the testator of the deceased executor: *Wetzler v. Fitch*, 52 Cal. 638, 643. Where the same court has jurisdiction, both in equity and in matters of probate, such court may, in an action in equity for an accounting against the executor of a deceased administrator, determine the amount due the attorney of the deceased administrator, and may withhold for future determination by the probate court the question as to the amount of commission due to the deceased administrator on final settlement of the estate, and may reserve the power to require payment to the executor of such sum as the probate court may award to the deceased administrator for his services: *Pennie v. Roach*, 94 Cal. 515; 29 Pac. Rep. 956; 30 Pac. Rep. 106. If an administrator dies without having paid his attorney for legal services, an allowance may be made for their value in favor of his executor: *Pennie v. Roach*, 94 Cal. 515;

29 Pac. Rep. 956; 30 Pac. Rep. 106. If an administrator dies without rendering an account, a court of equity must take the place of the probate court for the purpose of settling such account, and in directing payment out of the estate of the amount it finds to be due from it; and when it determines that the estate is indebted for moneys received by the deceased administrator and unexpended, and payment thereof is directed, it becomes the duty of the administrator of the estate of the administrator to make the payment, and his failure to do so constitutes a breach of the administrator's bond, for which the sureties are liable. The decree of a court of equity, directing payment out of the estate of the intestate, is to be regarded in the light of a decree of the probate court settling the account and directing payment: *Chaquette v. Ortet*, 60 Cal. 594, 601. If an executor or administrator dies, leaving the estate unsettled, his sureties must be made parties to a proceeding requiring the defendant to file papers and vouchers in his possession showing the disbursements made by his intestate, and a citation must be issued to them, or the decree will not be binding upon them, or even evidence against them: *In re Herren's Estate*, 40 Or. 90, sub nom. *Gatch v. Simpson*, 66 Pac. Rep. 688, 691. Where one of two executors died, having in his hands funds of the estate, which could not be identified as such, it is necessary that a claim be presented against the estate of the deceased executor: *Estate of Smith*, 108 Cal. 115, 122; 40 Pac. Rep. 1037. If an executor or administrator or guardian dies or absconds, or is beyond the jurisdiction of the court, the proper method, in order to ascertain whether he is liable, and to what extent, so as to bind the sureties on his official bond, is by a proceeding in the nature of a civil action, wherein the sureties are made parties and have an opportunity to be heard: *Reither v. Murdock*, 135 Cal. 197, 201; 67 Pac. Rep. 784.

REFERENCES.

Method of compelling settlement of accounts of deceased executor or administrator: See note 8 Am. St. Rep. 684. That, in case of the death of an executor or administrator, his personal representative is to present his account: See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1639.

17. **Insolvent administrators.** A debt due the estate from an insolvent administrator is not, for all purposes, regarded as money on hand, but is so regarded only by a fiction of law. The administrator should be charged with the entire sum, including the debt due from himself, and the decree should then show what portion of that amount consists of debts due from the administrator which he reports as cash on hand. Of course, if it appears that he actually has the money this formula would be unnecessary. The sureties do not agree to augment the estate, but that the executor will not waste it or be in default. Hence, where he has all that comes to his hands, and all that by the

greatest diligence he can get, there is no default, and no deficiency to make good. If he is ready to distribute this, he cannot do more, unless he can make something out of nothing: *Estate of Walker*, 125 Cal. 242, 245, 247, 249; 73 Am. St. Rep. 40; 57 Pac. Rep. 991. In an application by persons interested in the ultimate accounting of an administrator or executor, the petition therefor must aver that the decedent's estate is ready for final settlement: *In re Morrison's Estate*, 48 Or. 612; 87 Pac. Rep. 1043, 1044.

18. Trial by jury. Mere exceptions to an accounting do not create "issues of fact joined," such as must be submitted to a jury on demand of a party in interest: *Estate of Sanderson*, 74 Cal. 199, 209; 15 Pac. Rep. 753. But there may be cases in which it is very desirable to submit an issue arising on the settlement of an account to a jury. If no jury is demanded under the statute, the court must try the issues joined, but it was not really intended that every possible disputed fact in any step of the administration of the estate might, as a matter of right, be made an issue to be tried by a jury. The statute should not be construed as granting an absolute right to a jury trial, in which, according to the course of the common law, a jury trial was denied as inappropriate, especially in the settlement of accounts of administrators and executors, where so much is left to the mere discretion of the judge: *Estate of Moore*, 72 Cal. 335; 13 Pac. Rep. 880, 882. See *Estate of Mullins*, 47 Cal. 450.

19. Validity of settlement. A settlement of the accounts of an executor or administrator, without notice, is void: *Estate of Aveline*, 53 Cal. 259. It is also void where the executor had in his hands a large amount of money that belonged to the estate, but took no account of this money in his inventory, and did not account for it in any manner whatever. A final settlement of his accounts as executor, under such circumstances, is a fraud: *Perea v. Barela*, 5 N. M. 458, sub nom. *Garcia y Perea v. Barela*, 23 Pac. Rep. 766, 772. But if he has accounted for all the property that he has received, or that by reasonable diligence should have been received, the fact that certain property belonging to the estate was not appraised by the executor cannot affect the validity of his final account: *In re Conser's Estate*, 40 Or. 138; 66 Pac. Rep. 607, 610. A contract for the settlement of an estate out of court is void. No contract can be made regarding the assets of a deceased person's estate, except by the authority and with the approval of the probate court, and only then to the extent authorized or permitted by the laws of the state. In the absence of administration, no heir can make a contract that will be binding. No stipulation can be entered into by the widow that would bind the minor heirs in any manner respecting the settlement of the estate, or its property, or its debts. The law fixes the manner of administration. It imposes certain restrictions upon the sale of the assets of an estate, and even

when the sale is authorized by law, and ordered by the probate court, the sale, and its terms and its methods, are still subject to the approval of the court ordering it. No person interested in the estate can, by contract, assent, or by silence create other methods of selling the assets of the estate, than those prescribed by the law. To permit this in any one instance would withdraw all the safeguards and beneficent restrictions that the law imposes for the protection of the minor and non-resident heirs. The widow cannot make any contract that will bind the minor heirs; she can make no contract pledging the course of the administration of the law respecting the settlement of the estate of a deceased person: *Cox v. Scrubb*, 47 Kan. 435; 28 Pac. Rep. 157, 158. A final settlement is not invalidated by the fact that proof of the publication of notice to creditors was not filed within the time provided by the statute, if the notice was properly given. The time within which a creditor is required to present his claim begins to run from the first publication of the notice, and not from the filing of the proof thereof with the county clerk. The publication, and not the filing, is, therefore, the vital fact to be considered, and the date of the filing is not jurisdictional. The statute requiring it to be made within a certain time is directory, and not mandatory: *In re Conant's Estate*, 43 Or. 530; 73 Pac. Rep. 1018, 1020. Where the executor is found to be personally answerable for part of the loss occasioned by his purchase of unsecured promissory notes, the decree requiring him, in the settlement of his final account, to account for the sum so found to be due the estate must necessarily be based upon the allegations and proof: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 126. An order that the account of an executor or administrator "be, and the same is hereby, allowed and approved, except as to the matters following," etc., is sufficient as an order settling the account: *Estate of Sanderson*, 74 Cal. 199, 216; 15 Pac. Rep. 753.

20. Effect of settlement. In the settlement of the accounts of an executor or administrator, if the statute requires notice to be served upon him as to such settlement, a settlement without such citation, and in his absence, does not bind him or his sureties: *Estate of Aveline*, 53 Cal. 259, 261. Though a decree of distribution and a decree settling a final account are sometimes embraced in one decree of court, the decree settling a final account need not necessarily, in any way, affect the manner of the distribution of the estate: *Estate of Thayer*, 1 Cal. App. 104, 106; 81 Pac. Rep. 658; but a decree of settlement and distribution is binding upon the administrator: *McNabb v. Wixom*, 7 Nev. 163, 173. A final account decreeing that certain property is in the hands of the representative for distribution is an adjudication between the representative and the heirs and devisees fixing the status and character of that property: *Estate of Young*, 123 Cal. 337, 347; 35 Pac. Rep. 1011. Where the statute requires notice of the final account, and of the day for hearing objections to it, *ex parte* orders of the court, directing the

administrator to pay unauthorized bills, affords no protection to him on his final account: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 524. As claims allowed against an estate by the administrator and probate judge have the force and effect of judgments, it is error, upon the final settlement of the administrator's account, to reject sums paid by him on claims so allowed: *Deck's Estate v. Gherke*, 6 Cal. 666, 669. If, upon the allowance of the administrator's account, the "balance" in his hands is ordered to be paid, and that is done, it is presumed that all debts of the estate have been settled: *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 685. That portion of an order, upon the settlement of an account of an executor or administrator, which operates as a rejection of a claim, is a separate and distinct act from the order allowing the account; and the same may be said of that portion of the order which decrees the delivery of certain shares of corporate stock to the special administratrix: *In re Barker's Estate*, 26 Mont. 279; 67 Pac. Rep. 941, 942. The settlement of the accounts of an executor or administrator, though sometimes spoken of as an "order," is, in effect, a judgment: *Miller v. Lux*, 100 Cal. 609, 613; 35 Pac. Rep. 345, 639; *Estate of Levinson*, 108 Cal. 450, 454; 41 Pac. Rep. 483; 42 Pac. Rep. 479; *Estate of Walker*, 125 Cal. 242, 249; 73 Am. St. Rep. 40; 57 Pac. Rep. 991. The allowance of a claim against the estate of a deceased person is only a qualified judgment: *Selna v. Selna*, 125 Cal. 357, 362; 73 Am. St. Rep. 47; 58 Pac. Rep. 16. The allowance of a claim has the same effect as a judgment upon the claim; and as a judgment draws interest, an allowed claim therefore draws interest: *Estate of Glenn*, 74 Cal. 567, 568; 16 Pac. Rep. 396. After an administrator has filed his final account, showing that he has administered upon the estate, he is estopped from denying his representative character, or his liability to act accordingly: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 522. The allowance of the final account of an executor or administrator is not a decree of distribution, nor the legal equivalent of such a decree: *McCreay v. Haraszthy*, 51 Cal. 146, 151. The settlement of a final account of an executor or administrator bars the heirs from recovering property alleged to have been wrongfully omitted from the inventory; but the probate court has power to enforce the terms of a stipulation entered into by parties litigant before it respecting such property, and of which the court has jurisdiction: *Grady v. Porter*, 53 Cal. 680, 685; *Tobelman v. Hildebrandt*, 72 Cal. 313, 315; 14 Pac. Rep. 20.

REFERENCES.

Effect of annual settlements of executors and administrators as res judicata: See note 86 Am. Dec. 143-146.

21. Conclusiveness of settlement.

(1) *In general.* A determination in the settlement of the final account of an executor or administrator, if clearly within the jurisdic-

tion of the court, is final, unless an appeal has been taken from the decree: *Estate of Burdick*, 112 Cal. 387, 391; 44 Pac. Rep. 734. An order settling an administrator's account, and discharging him, is conclusive against his liability: *Reynolds v. Brumagim*, 54 Cal. 254, 258; *Grady v. Porter*, 53 Cal. 680, 685. No action can be brought, after an account is settled, against the administrator or executor for his neglect to bring an action for the recovery of land in the possession of adverse claimants. The order settling the account is conclusive against all persons interested: *Reynolds v. Brumagim*, 54 Cal. 254, 258. An order settling the account of an executor or administrator is conclusive of the amount with which he was at the time chargeable, and against every one interested, except those laboring under disability: *Estate of Stott*, 52 Cal. 403, 406; *Estate of Coutts*, 87 Cal. 480, 482; 22 Am. St. Rep. 265; 26 Pac. Rep. 92. At the proper time, upon the settlement of the account of an executor or administrator, the legality of his disposition of every dollar of the moneys he has expended is open to attack by the parties interested: *Estate of Bell*, 142 Cal. 97, 101; 75 Pac. Rep. 679. If an administrator purchases a claim against the estate he represents, and such claim is allowed as a secured claim in his first settled account, and creditors who have a right to object, but who do not object, to the settlement at that time, cannot afterwards object to its validity in the settlement of his final account: *Estate of McDougald*, 146 Cal. 191, 194, 196; 79 Pac. Rep. 878. Claims against the estate, which have been allowed by the administrator and the probate judge, have the force and effect of judgments; but this rule applies only to such claims as were debts against the deceased, and not to the expenses incurred or disbursements made by the administrator in his management of the estate, which latter claims are conclusive only after having been allowed by the probate court upon settlement of the account, after notice to the parties interested: *Deck's Estate v. Gherke*, 6 Cal. 667, 669; *Gurnee v. Maloney*, 38 Cal. 85, 88; 99 Am. Dec. 352. A decree approving the final account of an executor or administrator is only primary evidence of the correctness of the account as thereby settled and allowed. Such decree is not conclusive, but is only prima facie evidence: *Cross v. Baskett*, 17 Or. 84; 21 Pac. Rep. 47, 49. A wife's receipt to the executor of an estate whereby she releases all claims against the estate, does not bind her, where it appears that the executor had in his hands a large amount of money that belonged to her at the time of settlement, but did not account for it in any manner whatever. The final settlement of his accounts as executor, under such circumstances, is a fraud upon her rights, and is null and void: *Perea v. Barela*, 5 N. M. 458, sub nom. *Garcia y Perea*, 23 Pac. Rep. 766.

REFERENCES.

Conclusiveness of decrees of distribution, and power of chancery to correct or set aside a settlement of accounts in probate courts: See

note 48 Am. Dec. 744-751. Effect of annual settlements of executors and administrators as res judicata: See note 86 Am. Dec. 143-146.

(2) **Items included. Items omitted.** After proper notice has been given, an order settling the account of an executor or administrator is conclusive as to all items contained in it, except as to persons laboring under some legal disability; and, in this respect, there is no difference between a final account — that is, one made with a view to the immediate distribution of the estate — and any other account: *Estate of Grant*, 131 Cal. 426, 429; 63 Pac. Rep. 731. It is to be noticed that courts have fallen into the habit of calling accounts filed prior to the account on final settlement "annual" accounts, although the code does not use that word: *Estate of Grant*, 131 Cal. 426, 429; 63 Pac. Rep. 731. Though an accounting or settlement is conclusive as to the matters adjudicated, it is not conclusive as to matters omitted from the account, and such matters may therefore be surcharged in a subsequent settlement: *Estate of Adams*, 131 Cal. 415, 418; 63 Pac. Rep. 838. The decree of the probate court settling the accounts of the executor or administrator, and fixing the amount of his liability, is conclusive upon all persons interested in the estate who are not under disability: *Washington v. Black*, 83 Cal. 290; 23 Pac. Rep. 300. Items in a final account which were allowed in previous accounts, and which were settled after due and sufficient notice of the filing of said accounts, and of the time and place of hearing the same had been given, are conclusive, and cannot be reexamined upon the settlement of the final account: *Estate of Marshall*, 118 Cal. 379, 381; 50 Pac. Rep. 540; *Guardianship of Wells*, 140 Cal. 349, 353; 73 Pac. Rep. 1055. It has been said, in a late case, that a judgment or an order of a court having jurisdiction is conclusive of all matters involved "which might have been disputed" at the hearing, although no objection was in fact made; and that this rule applies to the settling of accounts, the same as to any other proceeding: *Estate of McDougald*, 146 Cal. 191, 195; 79 Pac. Rep. 878. But the general rule seems to be, that the settlement of the annual account of the executor or administrator is conclusive only as to the items actually included therein, and does not estop him from including in his final account any item not previously included and passed upon in any annual account, though it be for a demand existing prior thereto: *Estate of Adams*, 131 Cal. 415, 417; 63 Pac. Rep. 838. The settlement of an annual account is not conclusive, even as against the heirs, legatees, or creditors, except as to such matters as were actually included in such former account, and directly passed upon by the court; and the fact that the heirs, legatees, and creditors are expressly permitted to contest matters not included or passed upon in any former account, necessarily implies that the administrator is not precluded from going behind the former account and bringing forward

charges, which, through inadvertence or oversight, may have been omitted: *Walls v. Walker*, 37 Cal. 424, 426; 99 Am. Dec. 290.

22. Vacating accounts. Collateral attack. Relief in equity.

(1) **In general.** After a court has settled the account of an executor, it has no jurisdiction to set aside the settlement of any previous account, and to reopen the same and to adjudicate against him items which were conclusively adjudicated in his favor in the former order: *Estate of Grant*, 131 Cal. 426, 429; 63 Pac. Rep. 731. Where accounts have been settled by the approval of the court, and the final decree had, they cannot be reopened by a legatee, who was represented by counsel at the allowance of the accounts against the estate, after a lapse of time, on a mere general averment of newly-discovered evidence: *Williams v. Price*, 11 Cal. 212, 213. Nor can an alleged mistake in an account be corrected on a final account, where such mistake was claimed to have been made in an account filed five years before, but there is no sufficient proof of the alleged mistake: *Estate of Herteman*, 73 Cal. 545; 15 Pac. Rep. 121, 123. Although a final settlement is made by the administrator or guardian, the owner of land and beneficiary of a trust will ordinarily not be estopped from asserting title to the land wrongfully obtained by a trustee, unless the beneficiary had full knowledge of the wrongs practiced by the trustee, and of the facts upon which the rights of the beneficiary are founded. Nor can the fact that the trustee made improvements on land so obtained during the infancy of the beneficiary, and with her knowledge, prevent her from claiming the land after she attains majority: *Webb v. Branner*, 59 Kan. 190; 52 Pac. Rep. 429. But the settlement of the account of an administratrix, by the probate court, will not be disturbed on the application of a minor, where twenty years have elapsed, and the records of the probate court show that the minor heir was represented, both upon the allowance and settlement of the first account, and the final settlement and partition of the estate, by a guardian ad litem, a different guardian ad litem being appointed in each instance, and notwithstanding the fact that they now testify that they have no recollection of the circumstances, and where both certified then that they had examined the petitions and accounts filed in the proceedings on behalf of the said minor and consented to the allowance and distribution prayed for: *Bowen v. Hughes* (Wash.), 32 Pac. Rep. 98, 100.

(2) **Void decree, only, may be vacated.** If the decree of final settlement in the county court is void for want of jurisdiction, that court has a right to vacate and set it aside at any time, and does not err in so doing; but, if the decree is not void, it cannot be disturbed by the court that entered it, after the expiration of the term: *In re Conant's Estate*, 43 Or. 530; 73 Pac. Rep. 1018, 1019.

(3) Cannot be set aside for "mistake," etc., when. A decree settling the final account of an executor, and discharging him from his trust, if regular upon its face, cannot be set aside by the probate court on the ground that it had been inadvertently and prematurely entered, after the expiration of the time limited by statute under which a party or his legal representative may be relieved from a judgment, order, or other proceeding taken against him through his "mistake, inadvertence, surprise, or excusable neglect": *Estate of Cahalan*, 70 Cal. 604, 607; 12 Pac. Rep. 427.

(4) Collateral attack. The order of a probate court allowing or disallowing a final account, is a final settlement and an adjudication of the matter of which it assumes to dispose, and it cannot thereafter be collaterally attacked or impeached in the same or any other court by the parties thereto, or those in privity with them: *Tobelman v. Hildebrandt*, 72 Cal. 313, 316; 14 Pac. Rep. 20. A judgment entered by a county court of this state upon the final accounting of an executor is of equal rank with judgments entered in other courts of record in this state, and is conclusive as against collateral attack, except upon jurisdictional grounds and those of collusion and fraud: *Joy v. Elton*, 9 N. D. 428; 83 N. W. Rep. 875.

(5) Equitable relief. In general. While the district courts, by virtue of their general equity powers, may nullify orders of final settlement made in the probate courts, yet they will not do so as to orders, provisional and interlocutory in their nature, and which do not finally conclude the rights of the interested parties: *Ladd v. Nystol*, 63 Kan. 23; 64 Pac. Rep. 985. The annual settlements between administrators and probate courts, while not conclusive adjudications, are prima facie correct. They are in the nature of accounts stated, and can be impeached by proceedings brought therefor in the district court only for fraud or some other inequitable circumstance, and not for mere technical illegality in the conduct of the administration prior to the settlement: *Young v. Scott*, 59 Kan. 621; 54 Pac. Rep. 670. When a just demand against a decedent's estate is paid by the administrator, without a previous order of allowance by the probate court, but the payment made is credited to the administrator in his annual settlement with the court, a subsequent administrator de bonis non of the estate cannot impeach the settlement in a suit against his predecessor, for an accounting, brought in the district court, upon the sole ground that the demand paid had not been previously presented to the probate court and allowed by it: *Young v. Scott*, 59 Kan. 621; 54 Pac. Rep. 670. But, while such a settlement is final, one who was not a party to it may treat it as a nullity, and invoke the aid of a court of equity jurisdiction to compel the administrator to render a full account: *Clarke v. Perry*, 5 Cal. 58, 60; 63 Am.

Dec. 82. Assuming that the superior court, sitting in probate, has no jurisdiction to compel an administrator to pay to an heir his distributive share, yet, if the petition states all the elements of a bill in equity for an accounting, and is answered on the merits, without objection to the form of the proceeding, the fact that it is entitled in the estate, instead of being in form an independent action, can make no difference. The petition, under these circumstances, may be regarded as a petition in equity, addressed to the equitable powers of the superior court, and the form of its title is immaterial: *Estate of Clary*, 112 Cal. 292, 294; 44 Pac. Rep. 569.

REFERENCES.

Relief in equity from orders settling the accounts of executors and administrators: See note 106 Am. St. Rep. 641. Settlement of decedent's estate in equity: See note 2 Am. & Eng. Ann. Cas. 870.

(6) **Equitable relief for fraud or mistake.** If the settlement of the final account of a guardian has been procured by the employment of fraud and artifice, equity has jurisdiction to afford relief, and to compel a full and just accounting: *Silva v. Santos*, 138 Cal. 536, 541; 71 Pac. Rep. 703. It is well established that the settlement of an administrator's account by the decree of a probate court does not conclude as to property fraudulently or accidentally withheld from the account. If the property was omitted by mistake, or has been subsequently discovered, a court of equity may exercise its jurisdiction in the premises and take such action as justice to the heirs of the deceased or to the creditors of the estate may require, even if the probate court might, in such a case, open its decree and administer upon the omitted property. And a fraudulent concealment of property, or a fraudulent disposition, is a general or always existing ground for the interposition of equity: *Lataillade v. Oreña*, 91 Cal. 565, 576; 25 Am. St. Rep. 219; 27 Pac. Rep. 924. A decree approving and settling the final account of an administrator is a final adjudication, and if it was procured by fraud, a court of equity has jurisdiction of the cause, although distribution has not been made and the administrator has not been discharged: *Froebrieh v. Lane*, 45 Or. 13; 76 Pac. Rep. 351, 353. Where a decree approving and settling the final account of an administrator is attacked for fraud, the fact that the suit was not instituted until more than eight months after the entry of final settlement does not constitute such laches as to preclude plaintiff from insisting upon the remedy invoked: *Froebrieh v. Lane*, 45 Or. 13; 76 Pac. Rep. 351, 354. If, however, the heirs of the decedent have knowledge of the fraudulent conduct of the executor prior to the settlement of his account, in omitting to include in the inventory of the estate, or to charge himself in his final account with, an indebtedness due from himself to the decedent, and the

account is settled by the court as presented, they are concluded by the decree, and cannot afterwards maintain an action against the executor to recover the indebtedness: *Tobelman v. Hildebrandt*, 72 Cal. 313, 316; 14 Pac. Rep. 20. A court of equity will review and enjoin or annul decrees of probate courts upon the final settlements of executors and administrators, upon the application of injured parties, for fraud, and in some cases for mistake, or where the matter complained of may have arisen either from fraud or mistake, or constitutes constructive fraud: *Froebrich v. Lane*, 45 Or. 13; 76 Pac. Rep. 351, 352; *Tobelman v. Hildebrandt*, 72 Cal. 313, 316; 14 Pac. Rep. 20; *Lataillade v. Oreña*, 91 Cal. 565, 576; 25 Am. St. Rep. 219; 27 Pac. Rep. 924. An action for fraud, however, in making such a settlement cannot be maintained where the allegations of the petition fail to state a case of fraud: *Ladd v. Nystol*, 63 Kan. 23; 64 Pac. Rep. 985, 986; *In re Conant's Estate*, 43 Or. 530; 73 Pac. Rep. 1018. A court of equity has jurisdiction to set aside the decree of a county court, approving and settling the final account of an administrator, procured by fraud, notwithstanding the existence of a statute giving such last-named court exclusive jurisdiction, in the first instance, to settle such accounts. Neither does the existence of a statute under which a party may obtain relief from a judgment rendered against him through his "mistake, inadvertence, surprise, or excusable neglect" preclude the proceeding in equity where the remedy under such statute has not been invoked. The equitable remedy, however, has its just limitations, and cannot be utilized for the correction of errors or irregularities; and where the party has had an opportunity to be heard in the original proceeding, and to have the matter revised on appeal, but has neglected to avail himself thereof, he is not entitled to redress in the equitable forum: *Froebrich v. Lane*, 45 Or. 13; 76 Pac. Rep. 351, 353.

23. Appeal.

(1) **In general.** Whether an order is appealable is to be determined by what it purports to determine, not by what may be its actual operative effect: *Estate of Bullock*, 75 Cal. 419, 421; 17 Pac. Rep. 540. Before an appeal can be taken from the action of the probate court on any part of the final settlement of an administrator, it must appear that the probate court has taken final action on the settlement, and has passed on the whole account presented: *Appeal of Biggie*, 52 Kan. 184; 34 Pac. Rep. 782. *Contra*: *Estate of Rose*, 80 Cal. 166, 170; 22 Pac. Rep. 86. The right to move for a new trial has been extended in probate matters only to two cases, to wit, a contest over a petition for letters testamentary and a petition for the sale of land. The proceeding is not applicable to the case of an order settling the account of an executor or administrator: *Estate of Franklin*, 133 Cal. 584, 587; 65 Pac. Rep. 1081. An order settling

the account of an executor or administrator is not a final judgment upon which a statement or motion for a new trial may be based: *Estate of Franklin*, 133 Cal. 584, 587; 65 Pac. Rep. 1081. The allowance to an executor or administrator of a sum paid to expert accountants for examining the books of a partnership, of which the decedent was a member, is a matter committed to the sound discretion of the court, and will not be disturbed, where no abuse of discretion is shown: *Estate of Levinson*, 108 Cal. 450, 457; 41 Pac. Rep. 483; 42 Pac. Rep. 479. On appeal from a decree made upon a final accounting and settlement of the accounts of an executor or administrator, the petition and account filed with the view to a final settlement, and the written objection filed thereto, constitute a part of the record to be used on appeal without being so made by a bill of exceptions or a statement of facts that constitute the judgment roll: *Estate of Isaacs*, 30 Cal. 105, 110; *Miller v. Lux*, 100 Cal. 609, 613; 34 Pac. Rep. 345, 639.

(2) **Appealable orders.** An order settling the final account of an executor or administrator is appealable: *Estate of Coutts*, 87 Cal. 480, 482; 25 Pac. Rep. 685. An interlocutory order settling the account of an administrator, but not discharging him from his trust, is not a final judgment, but such order is appealable: *Estate of Rose*, 80 Cal. 166, 170; 22 Pac. Rep. 86; *Estate of Sanderson*, 74 Cal. 199; 15 Pac. Rep. 753. *Contra*: *Appeal of Biggie*, 52 Kan. 184; 34 Pac. Rep. 782. A decree ordering, adjudging, and decreeing "that the said final account of said administrator be, and the same is, settled, allowed, and affirmed," is a decree allowing a final account, and such as that from which the statute authorizes an appeal to be taken: *Bowman v. Bowman*, 27 Nev. 413; 76 Pac. Rep. 634, 635. There is no distinction between orders settling accounts as to their appealability. An order settling an account is appealable, whether it be a final or any other account: *Estate of Grant*, 131 Cal. 426, 429; 63 Pac. Rep. 731.

(3) **Non-appealable orders.** The Montana statute does not permit an appeal from an order directing an administrator to turn over to his successor, upon resignation or removal, the property belonging to the estate, or which has come into his hands as such: *In re Barker's Estate*, 26 Mont. 279; 67 Pac. Rep. 941, 943. And an order disallowing a claim against an estate is not appealable, where the statute provides that if a claim is rejected the holder must bring suit within a certain time or be barred, as that provides an exclusive remedy: *In re Barker's Estate*, 26 Mont. 279; 67 Pac. Rep. 941, 942.

(4) **Parties. Representative.** Upon the settlement of the account of an executor or administrator, only those parties interested in the

estate who appear in the superior court and make some objection or exception to the account, or in some way make themselves parties of record to that proceeding, are necessary parties to an appeal from any order made therein. Having failed to make themselves parties to the proceeding, they must, for the preservation of any advantage to themselves accruing from the order appealed from, depend upon the efforts of those who made the contest for their benefit: *Estate of McDougald*, 143 Cal. 476, 482; 77 Pac. Rep. 443; 79 Pac. Rep. 878, 879. If there is in the hands of the executor or administrator money which he claims does not belong to the estate, he should himself take steps to test the right, if a serious question arises, and if he is improperly charged, his remedy is to appeal from the decree settling his final account: *Estate of Burdick*, 112 Cal. 387, 391; 44 Pac. Rep. 734. If money belonging to the estate is ordered to be charged to the administrator, though it appears upon the face of the order that the money is in fact in the hands of a third person, the order, if erroneous, must be appealed from; otherwise the administrator is concluded thereby, and is chargeable with the amount, whether collected or not, if necessary for the payment of creditors: *Estate of Carver*, 123 Cal. 102, 106; 55 Pac. Rep. 770. But an executor or administrator cannot, in his representative capacity, ask for the review of an order disallowing his individual claim against the estate: *In re Barker's Estate*, 26 Mont. 279; 67 Pac. Rep. 941, 943. Nor can he, in his private capacity, have reviewed an order requiring him, as administrator, to turn over certain property to a special administrator, which has come into his possession in his representative capacity, though there may be a dispute as to the ownership of the property, the administrator claiming it in his private capacity as agent for third persons: *State v. District Court*, 26 Mont. 369; 68 Pac. Rep. 856, 857. The attorney for the executor or administrator is not "interested in the estate," and is not required to contest the accounts of an executor or administrator, and is not concluded by their settlement: *Briggs v. Breen*, 123 Cal. 657, 660; 56 Pac. Rep. 633, 886. He has recourse against the executor or administrator personally, and is therefore not entitled to appeal from the settlement of the latter's account: *Estate of Kruger*, 143 Cal. 141, 145, 146; 76 Pac. Rep. 891.

(5) **Notice.** The only parties to the record are those who appear and resist the application for final settlement and accounting; and other persons, equally interested and equally affected by the order, but who do not see fit to make any contest or objection to the account, or to any matter stated therein, need not be served with notice of appeal: *Estate of McDougald*, 143 Cal. 476, 482; 77 Pac. Rep. 443; 79 Pac. Rep. 878, 879. The only parties upon whom it is necessary to serve notice of the appeal, in proceedings for the settlement of the account of an executor or administrator, are those

who make themselves parties in the court by appearing at the time of the settlement and contesting the account: *Estate of Scott* (Cal.), 77 Pac. Rep. 446. Upon an appeal from an order settling the account of an executor or administrator, the executor is the only adverse party upon whom it is necessary to serve notice of appeal: *Estate of Delaney*, 110 Cal. 563, 567; 42 Pac. Rep. 981. It is not necessary to serve with such notice a creditor whose claim had been allowed, but who did not make any appearance on the settlement of the account: *Estate of Carpenter*, 146 Cal. 661; 80 Pac. Rep. 1072, 1073. It is not necessary to serve notice of appeal on the attorneys of the executor or administrator, as they are not parties to the proceeding of settlement of account: *Estate of Carpenter*, 146 Cal. 661; 80 Pac. Rep. 1072, 1073. A notice of appeal, though not following the exact language of the statute, as being taken from an "order," instead of the decision or decree, is sufficiently descriptive of the document and matter appealed from, where no one can be misled by the notice of appeal: *Bowman v. Bowman*, 27 Nev. 413; 76 Pac. Rep. 634, 636. If the order settling and allowing the annual account of an executor or administrator recites that the clerk gave due and legal notice in the manner and for the time ordered by the court, such recital is conclusive on the parties on appeal; and if, under the statute, notice required in probate proceedings serves the purpose of a summons in ordinary actions, the giving of the notice in probate proceedings may be rendered useless by the appearance of the parties and participation in the proceedings. In such a case the purpose of the notice has been served, and one who has taken part in the hearing will not be heard to say that the court had no jurisdiction to determine his right: *In re Davis' Estate*, 33 Mont. 539; 88 Pac. Rep. 957, 958.

(6) Findings. Bill of exceptions. Record. Express findings are not necessary on the settlement of the account of an executor or administrator: *Miller v. Lux*, 100 Cal. 609, 613; 35 Pac. Rep. 345, 639; *In re Levinson*, 108 Cal. 450, 455; 41 Pac. Rep. 483; 42 Pac. Rep. 479. But when such findings are filed in a contest of this character, they may be considered upon appeal for the purpose of determining the issues upon which such findings were made: *Estate of Adams*, 131 Cal. 415, 420; 63 Pac. Rep. 838. The settlement of the accounts of an executor or administrator, though sometimes spoken of as an "order," is, in effect, a judgment; and in a proceeding for the settlement of such an account the petition and account and the written objections filed to it are the pleadings, which the clerk of the court is required to attach to the copy of the judgment, and these constitute the "judgment roll"; and while, in such a proceeding, it is not incumbent upon the court to make and file express findings, still, when the account is assailed in any particular for matters not appear-

ing upon its face, the court may properly make express findings upon such issues, and when it does so, such findings become as much a part of the judgment roll as the judgment or order itself, and the account and exceptions thereto constitute the pleadings of the parties: *Miller v. Lux*, 100 Cal. 609, 613; 35 Pac. Rep. 345, 639. The account of an executor or administrator is itself a bill of items, and specifications of the insufficiency of the evidence to justify a decision settling the account are stated with sufficient particularity when the evidence is alleged to be insufficient to justify the decision allowing particular items of the account specified in the bill of exceptions: *In re Levinson*, 108 Cal. 450, 455; 41 Pac. Rep. 483; 42 Pac. Rep. 479. In the absence of a bill of exceptions showing the evidence on which an allowance was made to the executor or administrator for advancing funds for the purpose of carrying on litigation relative to the maintenance of a will, under which minor devisees and legatees claimed, an order allowing him interest on the sums so advanced will not be held erroneous: *Estate of Carpenter*, 146 Cal. 661; 80 Pac. Rep. 1072. The petition, and especially the account filed and submitted, and the exceptions taken to the account by any person or persons interested, constitute, in part at least, the jurisdictional facts on which the decree is founded, and are necessary on appeal from the judgment or decree, made on the settlement of the executor's account, as are the pleadings in an ordinary civil action upon an appeal from a judgment or order therein: *Estate of Isaacs*, 30 Cal. 105, 111. A mere statement in a bill of exceptions, that a party excepted to a decision of the court, does not constitute an exception available on appeal, unless the objection is stated, and also the ground upon which it was made: *Estate of Page*, 57 Cal. 238, 239. If the appellant fails to point out why certain items should be allowed, and the attention of the court is not called to the evidence to justify them, it will be presumed that the evidence sustains the finding as to such items, for it is not the duty of the court to search through the record for the necessary evidence: *Estate of Shively*, 145 Cal. 400; 78 Pac. Rep. 869, 871. The judgment roll on an appeal from an order settling the account of an executor or administrator consists of the petition and account and reports accompanying the same, objections and exceptions thereto, if any, findings of the court, if any, and the order settling the account: *Estate of Thayer*, 1 Cal. App. 104; 81 Pac. Rep. 658, 659. The filing of an account by an executor or administrator makes the inventory upon which it was predicated a part of the record, and it is properly included in the transcript on appeal without having been offered in evidence: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 522; but the petition for letters of administration, the order appointing the administrator, his undertaking, and the order directing a distribution of the funds of the estate, not being a necessary part of the

final report, will not be considered, where they were not offered in evidence: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 522.

(7) **Sufficiency of judge's certificate.** On appeal from a portion of a decree settling the final account of an administrator fixing and settling his compensation, the judge's certificate is sufficient, where it declares that he has examined the contents "of the within transcript on appeal in said matter," and finds that "the" papers and orders therein set forth and contained are copies of "the" original papers and orders "filed and used" upon the hearing, and in the various proceedings of the said estate. While the certificate does not, in so many words, state that the papers and orders set forth in the transcript are "all" the papers and orders used in the proceeding, it is clear that, by the employment of the definite article "the," as descriptive of the papers and orders thus used, the judge intended to and did certify that said papers and orders were in fact "all" the papers and orders so used: *Estate of Davis*, 6 Cal. App. 785, 787 (June 8, 1908).

(8) **Consideration of case. Review.** Upon appeal from an order settling the account of an executor or administrator, all the proceedings leading up to it, including the evidence upon which it is based, are open to review: *Estate of Rose*, 80 Cal. 166, 170; 22 Pac. Rep. 86. Where, on the final settlement of an estate, a judgment is rendered that the administrator pay to the heir a certain sum, the judgment is the thing necessary to appeal from, and such appeal brings up the whole matter for retrial: *Gunn v. Newcomer*, 9 Kan. App. 883; 57 Pac. Rep. 1052. If an order is entered settling the account of an executor or administrator, and, more than sixty days after it is signed and filed with the clerk, an appeal is taken, but in less than sixty days after it was entered in the minute-book of the court, the evidence upon which such order was based is open for examination and review by the appellate court, notwithstanding a provision of the code that, upon appeal from a judgment, the evidence cannot be reviewed unless the appeal was taken within sixty days after the rendition of the judgment: *Estate of Levinson*, 108 Cal. 450, 454; 41 Pac. Rep. 483; 42 Pac. Rep. 479; *Estate of Rose*, 80 Cal. 166; 22 Pac. Rep. 86. Where exceptions have been taken to items in an annual settlement of an administrator's account, after they have been allowed by the probate judge, and the probate court adheres to its former ruling, and the party excepting appeals to the district court, the allowance of the probate court is prima facie correct, and the burden of showing its incorrectness is upon the party who appeals: *Callan v. Savidge*, 68 Kan. 620; 75 Pac. Rep. 1010. The presumption on appeal is, that items disallowed in the account of an executor or administrator were properly disallowed: *Estate of Scott*, 1 Cal. App.

740; 83 Pac. Rep. 85, 87. Although an order setting aside a decree settling the final account of an executor is not directly appealable, it may be reviewed on appeal from a subsequent decree settling a final account on the ground that it is clearly an intermediate order, which necessarily affects the final judgment from which the appeal is properly taken: *In re Cahalan*, 70 Cal. 604, 607; 12 Pac. Rep. 427. If the court makes an order respecting the account of an executor or administrator, and afterwards amends it, leaving the original order and the amendment both in the record, their several orders may be considered together on a writ of review: *State v. Second Jud. Dist. Court*, 25 Mont. 33; 63 Pac. Rep. 717, 718. If an appeal is taken from several distinct and separate orders, though embraced in one notice of appeal, the appeals may be treated as separate and distinct: *In re Barker's Estate*, 26 Mont. 279; 67 Pac. Rep. 941, 942. Although the transcript on appeal from an order settling the accounts of an executor or administrator includes a decree of partial distribution, notice of appeal therefrom and a remittitur cannot be considered if they have not been included in a bill of exceptions as required by a rule of court: *Estate of Thayer*, 1 Cal. App. 104; 81 Pac. Rep. 658, 659. Upon an order simply settling a final account, no matter concerning the distribution of an estate would be necessarily determined, and no error in settling the final account, pending an appeal from a decree of partial distribution, is shown where the account rendered is not in the transcript, and there is nothing to show that the court, by its order settling the final account, determined any matter that it did not have jurisdiction to determine at the time. Under such circumstances, the court must assume that the account did not contain any account of any payment made under or in connection with the order of partial distribution, but only accounts of receipts of payments of debts of decedent and expenses of administration, which are matters proper to be considered in a final account: *Estate of Thayer*, 1 Cal. App. 104; 81 Pac. Rep. 658, 659. A decree settling the final account of an executor or administrator will not be disturbed upon appeal unless the appellant shows that his interest in the estate has suffered in some way by reason of the findings or the decree of the court. Appellant will not be heard to complain that he has received some part of the estate that should have gone to another person, or to his legal representatives: *Estate of Casner*, 1 Cal. App. 145, 147; 81 Pac. Rep. 991. In carrying out the decision of the appellate court as to the distribution of real property, the probate in which the proceedings originated, has no power to re-examine the settled account of the executor or administrator, to ascertain whether any part of the moneys included therein represented the net amount of the rents and profits collected by the executor from the real property. The judgment of the appellate court ordering distribution of the realty to the heir at law must be construed as oper-

ating upon the estate in its condition at the time of the going down of the remittitur. In other words, the realty of the estate should be distributed to the heir at law: *Estate of Pichoir*, 146 Cal. 404, 406; 80 Pac. Rep. 512. The petition for letters of administration, the order appointing the administratrix, her undertaking, and the inventory, although properly included in the transcript on appeal, will not be considered where they were not offered in evidence: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 522.

(9) Affirmance. Remanding. Reversal. Dismissal. Remittitur.

When the decree allowing a final account is found to be erroneous as to any item or items, the appellate court may direct the decree to be corrected, and, as corrected, affirm it: *Estate of Adams*, 131 Cal. 415, 420; 63 Pac. Rep. 838. But if it appears that, by reason of irregularities in the proceedings, parties in interest were not heard in the settlement, the cause will be remanded for further proceedings, in order that a proper settlement of the account may be had: *Estate of Runyon*, 53 Cal. 196. On appeal from an order settling the account of an executor or administrator, such order will not be disturbed, if there is any evidence to sustain the findings of the court, whether the appellate court would have found the same way upon the same evidence or not: *Estate of Rose*, 80 Cal. 166, 180; 22 Pac. Rep. 86. But an order settling the final account of an executor or administrator will not be reversed for want of proper vouchers and evidence as to the correctness of the account: *Estate of Rose*, 63 Cal. 349, 351. As the method of settling final accounts of an executor or administrator does not necessarily involve the method of distribution of the estate, and as distribution to the heirs or legatees may take place upon the settlement of a final account, or at any subsequent time, the settlement of a final account, pending appeal from a decree of partial distribution, will not be disturbed on appeal, where it in no way appears that any payment under the decree of partial distribution, or any expenses incurred therewith, was presented by the final account: *Estate of Thayer*, 1 Cal. App. 104; 81 Pac. Rep. 658, 659. An appeal, dismissed because there was nothing to appeal from, does not preclude another appeal in the same case, where the record should have been made up from which an appeal can be taken. Hence, the dismissal of an appeal prematurely taken is no bar to a subsequent appeal: *Estate of Rose*, 80 Cal. 166, 171; 22 Pac. Rep. 86. An appeal from an order settling the annual account of an executor or administrator must be dismissed for failure to file the transcript within the prescribed time; and such dismissal cannot be prevented by the pendency of a statement on motion for a new trial, as such a motion is not applicable to an order settling an account: *Estate of Franklin*, 133 Cal. 584, 587; 65 Pac. Rep. 1081. Although a rule of court requires appellants to print, in their brief, the findings of fact on

appeal from an order settling and allowing the account of an executor or administrator, such failure is not ground for dismissing the appeal, where the court made findings and passed on a large number of separate items, and appellants failed to print such separate findings in their brief: *In re Alfstad's Estate*, 27 Wash. 175; 67 Pac. Rep. 593, 594. An appeal by a mortgagee must be dismissed where the record does not show that he is an aggrieved party: *Estate of Crook*, 125 Cal. 459, 461; 58 Pac. Rep. 89. The refusal of the appellate court to dismiss an appeal from an order settling the account of an administrator between contestant parties, because a creditor was not served with notice of appeal, does not determine the question whether the creditor who did not appear has a right of appeal from such order, or from an order for the payment of claims. The rules governing the question who must be served with notice of appeal are not identical with those that control the question who may have the right of appeal: *Estate of McDougald*, 143 Cal. 476, 483; 77 Pac. Rep. 443; 79 Pac. Rep. 878, 879. When the remittitur has been duly and legally issued without inadvertence, the appellate court has no power to recall it. That court thereupon loses jurisdiction of the cause, except in the case of mistake, fraud, or imposition practised upon the court: *Estate of Levinson*, 108 Cal. 450, 459; 41 Pac. Rep. 483; 42 Pac. Rep. 479.

CHAPTER III.

PAYMENT OF DEBTS OF ESTATE.

- § 698. Order in which debts must be paid.
- § 699. Where property is insufficient to pay mortgage.
- § 700. If estate is insufficient, a dividend must be paid.
- § 701. Funeral expenses and expenses of last sickness.
- § 702. Order for payment of debts, and final discharge.
- § 703. Form. Decree settling account and for payment of claims.
- § 704. Form. Decree settling final account. Insolvent estate.
- § 705. Form. Decree of final discharge.
- § 706. Provision for disputed and contingent claims.
- § 707. Personal liability of representatives to creditors.
- § 708. Claims not included in order for payment of debts, how disposed of.
- § 709. Order for payment of legacies and extension of time.
- § 710. Final account, when to be made.
- § 711. Neglect to render final account. How treated.

PAYMENT OF DEBTS.

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| 1. In general. | (8) Rents and profits. |
| 2. Order of payment cannot be changed. | (4) Property bequeathed or devised. |
| 3. Preference. | 8. Marshaling of assets. |
| 4. Payment of claims prior to settlement. | 9. Decree or order for payment. |
| 5. Premature or unauthorized payments. Advancement. | (1) In general. |
| 6. Funeral expenses. Monuments, etc. Expenses of administration. | (2) Application for order. |
| (1) Burial. | (3) Duty of court. Granting of order. |
| (2) Funeral expenses. | (4) Validity of order. Effect of. |
| (3) Expenses of administration. | 10. Payment of interest-bearing claims. |
| 7. Property available for payment of debts. | 11. "Contingent" claims. |
| (1) In general. | 12. Deficiency. Part payment. Disputed claims. |
| (2) Community property. | 13. "Dividends." |
| | 14. Mortgages and judgments. |
| | 15. Enforcement of payment. |
| | 16. Appeal. |

§ 698. Order in which debts must be paid. The debts of the estate, subject to the provisions of section twelve hundred and five, must be paid in the following order:

1. Funeral expenses;

2. The expenses of the last sickness;
3. Debts having preference by the laws of the United States;
4. Judgments rendered against the decedent in his lifetime, and mortgages and other liens in the order of their date;
5. All other demands against the estate.

If a debt is payable in a particular kind of money or currency, it must be paid only in such money or currency. If the estate is insolvent, no greater rate of interest must be paid upon any debt, from the time of the first publication of notice to creditors, than is allowed by law on judgments. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 503), § 1643.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 872, p. 325.
- Arizona.** Rev. Stats. 1901, par. 1875.
- Colorado.** 3 Mills's Ann. Stats., sec. 4778.
- Idaho.** Code Civ. Proc. 1901, sec. 4259.
- Kansas.** Gen. Stats. 1905, § 2954.
- Montana.** Code Civ. Proc., sec. 2810.
- Nevada.** Comp. Laws, sec. 2981.
- New Mexico.** Comp. Laws 1897, sec. 2002.
- North Dakota.** Rev. Codes 1905, § 8118.
- Oklahoma.** Rev. Stats. 1903, sec. 1739.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1212.
- South Dakota.** Probate Code 1904, § 291.
- Utah.** Rev. Stats. 1898, sec. 3870.
- Washington.** Pierce's Code, § 2655.
- Wyoming.** Rev. Stats. 1899, sec. 4726.

§ 699. Where property is insufficient to pay mortgage. The preference given in the preceding section to a mortgage or lien only extends to the proceeds of the property subject to the mortgage or lien. If the proceeds of such property are insufficient to pay the mortgage or lien, the part remaining unsatisfied must be classed with general demands against the estate. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 503), § 1644.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 873, p. 325.
Arizona. Rev. Stats. 1901, par. 1876.
Idaho. Code Civ. Proc. 1901, sec. 4260.
Montana. Code Civ. Proc., sec. 2811.
Nevada. Comp. Laws, sec. 2982.
North Dakota. Rev. Codes 1905, § 8119.
Oklahoma. Rev. Stats. 1903, sec. 1740.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1213.
South Dakota. Probate Code 1904, § 292.
Utah. Rev. Stats. 1898, sec. 3871.
Washington. Pierce's Code, § 2656.
Wyoming. Rev. Stats. 1899, sec. 4727.

§ 700. If estate is insufficient, a dividend must be paid.
 If the estate is insufficient to pay all the debts of any one class, each creditor must be paid a dividend in proportion to his claim; and no creditor of any one class shall receive any payment until all those of the preceding class are fully paid.
Kerr's Cyc. Code Civ. Proc., § 1645.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 875, p. 325.
Arizona. Rev. Stats. 1901, par. 1877.
Idaho.* Code Civ. Proc. 1901, sec. 4261.
Montana.* Code Civ. Proc., sec. 2812.
Nevada.* Comp. Laws, sec. 2983.
New Mexico. Comp. Laws 1897, sec. 2003; Laws 1901, p. 157, sec. 35.
North Dakota. Rev. Codes 1905, § 8121.
Oklahoma.* Rev. Stats. 1903, sec. 1741.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1215.
South Dakota.* Probate Code 1904, § 293.
Utah. Rev. Stats. 1898, sec. 3872.
Washington.* Pierce's Code, § 2657.
Wyoming.* Rev. Stats. 1899, sec. 4728.

§ 701. Funeral expenses and expenses of last sickness.
 The executor or administrator, as soon as he has sufficient funds in his hands, must pay the funeral expenses and the expenses of the last sickness, and the allowance made to the family of the decedent. He may retain in his hands the necessary expenses of administration, but he is not obliged

to pay any other debt or any legacy until, as prescribed in this article, the payment has been ordered by the court **Kerr's Cyc. Code Civ. Proc.**, § 1646.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 861, p. 323; sec. 877, p. 326.
- Arizona.*** Rev. Stats. 1901, par. 1878.
- Idaho.*** Code Civ. Proc. 1901, sec. 4262.
- Montana.** Code Civ. Proc., sec. 2813.
- Nevada.** Comp. Laws, sec. 2984.
- New Mexico.** Comp. Laws 1897, sec. 2001; Laws 1901, p. 157, sec. 34.
- North Dakota.** Rev. Codes 1905, § 8122.
- Oklahoma.*** Rev. Stats. 1903, sec. 1742.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., §§ 1201, 1217.
- South Dakota.*** Probate Code 1904, § 294.
- Utah.** Rev. Stats. 1898, sec. 3869.
- Washington.*** Pierce's Code, § 2658.
- Wyoming.*** Rev. Stats. 1899, sec. 4729.

§ 702. Order for payment of debts, and final discharge.

Upon the settlement of the account of the executor or administrator, provided for in section sixteen hundred and twenty-eight, the court must make an order for the payment of the debts, as the circumstances of the estate require. If there are not sufficient funds in the hands of the executor or administrator, the court must specify in the decree the sum to be paid to each creditor. If the whole property of the estate is exhausted by such payment or distribution, such account must be considered as a final account, and the executor or administrator is entitled to his discharge on producing and filing the necessary vouchers and proofs showing that such payments have been made, and that he has fully complied with the decree of the court. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 503), § 1647.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 861, p. 322; sec. 879, p. 326.
- Arizona.** Rev. Stats. 1901, par. 1879.
- Colorado.** 3 Mills's Ann. Stats., sec. 4797.
- Idaho.** Code Civ. Proc. 1901, sec. 4263.
- Kansas.** Gen. Stats. 1905, §§ 3035, 3036.
- Montana.** Code Civ. Proc., sec. 2814.

Nevada. Comp. Laws, secs. 2376, 2985.

New Mexico. Comp. Laws 1897, sec. 8123.

Oklahoma. Rev. Stats. 1903, sec. 1743.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1201, 1219.

South Dakota. Probate Code 1904, § 295.

Utah. Rev. Stats. 1898, sec. 3873.

Washington. Pierce's Code, § 2659.

Wyoming. Rev. Stats. 1899, sec. 4730.

§ 703. Form. Decree settling account and for payment of claims.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Comes now ____, the administrator² of said estate, by ____, his attorney, and presents to the court for settlement his³ account and report, showing charges in favor of said estate amounting to ____ dollars (\$____), claiming credits amounting to ____ dollars (\$____), leaving a balance of ____ dollars (\$____) in his hands belonging to said estate; and he now proves to the satisfaction of the court that said account was filed on the ____ day of ____, 19____; that on the same day the clerk appointed the ____ day of ____, 19____, as the day for the settlement thereof; and that notice of the time and place of said settlement has been duly given as required by law;⁴ and no person appearing to except to or contest said account,⁵ the court, after hearing the evidence, finds said account correct, and that the claims set forth in the accompanying report are justly due and payable out of said estate.

It is therefore ordered, adjudged, and decreed by the court, That said account be in all respects approved, allowed, and settled, and that said administrator⁶ forthwith, out of the moneys in his⁷ hands belonging to said estate, pay all the debts filed and allowed against the said estate, to wit:

Claim of ____ allowed for ____ dollars (\$____);

Claim of ____ allowed for ____ dollars (\$____).⁸

Entered⁹ ____, 19____.

____, County Clerk.

By ____, Deputy.

Explanatory notes. 1. Give file number. 2. Or, administratrix.
3. Or, her. 4. If the matter has been continued, say, "and settlement

having been by the court regularly postponed to this day." 5. Or, and _____ having appeared by _____, his attorney, and filed his exceptions and objections to said account. 6. Or, administratrix. 7. Or, her. 8. Etc., enumerating each claim. 9. Orders or decrees need not be signed: See note to § 77, ante.

§ 704. Form. Decree settling final account. Insolvent estate.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

Comes now _____, the administrator² of said estate, by _____, his attorney, and presents to the court for settlement his final account and report, showing charges in favor of said estate amounting to _____ dollars (\$_____), and claiming credits amounting to _____ dollars (\$_____), leaving a balance of _____ dollars (\$_____) in his hands belonging to said estate; and from the proofs offered the court finds that said account was filed on the _____ day of _____, 19____; that on the same day the clerk appointed the _____ day of _____, 19____, as the day for the settlement thereof; and that notice of the time and place of said settlement has been duly given as required by law;³ and no person appearing to except to or contest said account,⁴ the court, after hearing the evidence, finds that said account is correct, and that the claims set forth in the accompanying report are justly due and payable out of said estate.

It is therefore ordered and adjudged by the court, That said account be in all things approved, allowed, and settled; and that said _____ forthwith pay the said balance in his hands upon the claims against said estate, as follows, to wit:

To _____ on his claim of _____ dollars (\$_____), the sum of _____ dollars (\$_____);

To _____ on his claim of _____ dollars (\$_____), the sum of _____ dollars (\$_____).⁵

_____, County Clerk.

Entered⁶ _____, 19____.

By _____, Deputy.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. If the matter has been continued, say, "and said settlement having been regularly postponed to this day." 4. Or, and _____ having appeared by _____, his attorney, and filed his exceptions to said account. 5. Enumerating each payment ordered. 6. Orders or decrees need not be signed: See note to § 77, ante.

§ 705. Form. Decree of final discharge.

[Title of court.]

[Title of estate.]

{	No. _____ ¹	Dept. No. _____
	[Title of form.]	

It appearing to this court that the above-entitled estate has been fully administered; that the administrator² has paid all sums of money due from him; that he has delivered up all property to the parties entitled thereto, and performed all the acts legally required of him in pursuance of the orders and decrees of this court; and that he has filed herein satisfactory vouchers therefor, —

It is ordered, adjudged, and decreed, That said _____ be, and he is hereby, discharged from further administering said estate, and that _____ and _____, sureties on his bond, are hereby released from any liabilities to be hereafter incurred.

Dated _____, 19____. _____, Judge of the _____³ Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Title of court.

§ 706. Provision for disputed and contingent claims. If there is any claim not due, or any contingent or disputed claim against the estate, the amount thereof, or such part of the same as the holder would be entitled to if the claim were due, established, or absolute, must be paid into the court, and there remain, to be paid over to the party when he becomes entitled thereto; or, if he fails to establish his claim, to be paid over or distributed as the circumstances of the estate require. If any creditor whose claim has been allowed, but is not yet due, appears and assents to a deduction therefrom of the legal interest for the time the claim has yet to run, he is entitled to be paid accordingly. The payments provided for in this section are not to be made when the estate is insolvent, unless a pro rata distribution is ordered. **Kerr's Cyc. Code Civ. Proc.**, § 1648.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 878, p. 326.

Arizona.* Rev. Stats. 1901, par. 1880.

Idaho.* Code Civ. Proc. 1901, sec. 4264.
Montana.* Code Civ. Proc., sec. 2815.
Nevada. Comp. Laws, sec. 2986.
New Mexico. Laws 1901, sec. 35, p. 157.
North Dakota. Rev. Codes 1905, § 8124.
Oklahoma.* Rev. Stats. 1903, sec. 1744.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1218.
South Dakota.* Probate Code 1904, § 296.
Utah.* Rev. Stats. 1898, sec. 3874.
Washington. Pierce's Code, § 2660.
Wyoming.* Rev. Stats. 1899, sec. 4731.

§-707. Personal liability of representatives to creditors.

When a decree is made by the court for the payment of creditors, the executor or administrator is personally liable to each creditor for his allowed claim, or the dividend thereon, and execution may be issued on such decree, as upon a judgment in the court, in favor of each creditor, and the same proceeding may be had under such execution as under execution in other cases. The executor or administrator is liable therefor on his bond to each creditor. **Kerr's Cyc. Code Civ. Proc., § 1649.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 879, p. 326.
Arizona.* Rev. Stats. 1901, par. 1881.
Colorado. 3 Mills's Ann. Stats., sec. 4799.
Idaho.* Code Civ. Proc. 1901, sec. 4265.
Kansas. Gen. Stats. 1905, § 3037.
Montana.* Code Civ. Proc., sec. 2816.
Nevada.* Comp. Laws, sec. 2987.
New Mexico. Laws 1901, sec. 36, p. 157.
Oklahoma.* Rev. Stats. 1903, sec. 1745.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1219.
South Dakota.* Probate Code 1904, § 297.
Utah.* Rev. Stats. 1898, sec. 3875.
Washington. Pierce's Code, § 2661.
Wyoming.* Rev. Stats. 1899, sec. 4732.

§ 708. Claims not included in order for payment of debts, how disposed of. When the accounts of the administrator or executor have been settled, and an order made for the payment of debts and distribution of the estate, no creditor

whose claim was not included in the order for payment has any right to call upon the creditors who have been paid, or upon the heirs, devisees, or legatees to contribute to the payment of his claim; but if the executor or administrator has failed to give the notice to the creditors, as prescribed in section fourteen hundred and ninety-one, such creditor may recover on the bond of the executor or administrator the amount of his claim, or such part thereof as he would have been entitled to had it been allowed. This section shall not apply to any creditor whose claim was not due ten months before the day of settlement, or whose claim was contingent and did not become absolute ten months before such day. **Kerr's Cyc. Code Civ. Proc.**, § 1650.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1882.
- Idaho.*** Code Civ. Proc. 1901, sec. 4266.
- Montana.*** Code Civ. Proc., sec. 2817.
- North Dakota.** Rev. Codes 1905, § 8126.
- Oklahoma.** Rev. Stats. 1903, sec. 1746.
- South Dakota.*** Probate Code 1904, § 298.
- Utah.** Rev. Stats. 1898, sec. 3876.
- Washington.** Pierce's Code, § 2662.

§ 709. **Order for payment of legacies and extension of time.** If the whole of the debts have been paid by the first distribution, the court must direct the payment of legacies and the distribution of the estate among the heirs, legatees, or other persons entitled, as provided in the next chapter; but if there be debts remaining unpaid, or if, for other reasons, the estate be not in a proper condition to be closed, the court must give such extension of time as may be reasonable for a final settlement of the estate. **Kerr's Cyc. Code Civ. Proc.**, § 1651.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 880, p. 326.
- Arizona.*** Rev. Stats. 1901, par. 1883.
- Colorado.** 3 Mills's Ann. Stats., sec. 4800.
- Idaho.*** Code Civ. Proc. 1901, sec. 4267.
- Montana.*** Code Civ. Proc., sec. 2818.

Nevada. Comp. Laws, secs. 2376, 2988.
New Mexico. Laws 1901, sec. 37, p. 157.
North Dakota.* Rev. Codes 1905, § 8125.
Oklahoma.* Rev. Stats. 1903, sec. 1747.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1220.
South Dakota.* Probate Code 1904, § 299.
Washington. Pierce's Code, § 2663.

§ 710. **Final account, when to be made.** At the time designated in the last section, or sooner, if within that time all the property of the estate has been sold, or there are sufficient funds in his hands for the payment of all the debts due by the estate, and the estate be in a proper condition to be closed, the executor or administrator must render a final account, and pray a settlement of his administration. **Kerr's Cyc. Code Civ. Proc., § 1652.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 862, p. 322.
Arizona.* Rev. Stats. 1901, par. 1884.
Colorado. 3 Mills's Ann. Stats., sec. 4806.
Idaho.* Code Civ. Proc. 1901, sec. 4268.
Montana.* Code Civ. Proc., sec. 2819.
Nevada. Comp. Laws, sec. 2989.
New Mexico. Laws 1901, sec. 27, p. 155.
Oklahoma.* Rev. Stats. 1903, sec. 1748.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1202.
South Dakota.* Probate Code 1904, § 300.
Utah. Rev. Stats. 1898, sec. 3952.
Washington. Pierce's Code, §§ 2478, 2664.

§ 711. **Neglect to render final account. How treated.** If he neglects to render his account, the same proceedings may be had as prescribed in this chapter in regard to the first account to be rendered by him; and all the provisions of this chapter relative to the last-mentioned account, and the notice and settlement thereof, apply to his account presented for final settlement. **Kerr's Cyc. Code Civ. Proc., § 1653.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 870, p. 324.
Arizona.* Rev. Stats. 1901, par. 1885.

Colorado. 3 Mills's Ann. Stats., sec. 4808.
 Idaho.* Code Civ. Proc. 1901, sec. 4269.
 Montana.* Code Civ. Proc., sec. 2820.
 Nevada.* Comp. Laws, sec. 2990.
 Oklahoma.* Rev. Stats. 1903, sec. 1749.
 Oregon. Bellingier and Cotton's Ann. Codes and Stats., § 1210.
 South Dakota.* Probate Code 1904, § 301.
 Washington.* Pierce's Code, § 2665.

PAYMENT OF DEBTS.

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| 1. In general. | (3) Rents and profits. |
| 2. Order of payment cannot be changed. | (4) Property bequeathed or devised. |
| 3. Preference. | 8. Marshaling of assets. |
| 4. Payment of claims prior to settlement. | 9. Decree or order for payment. |
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| 6. Funeral expenses. Monuments, etc. Expenses of administration. | (2) Application for order. |
| (1) Burial. | (3) Duty of court. Granting of order. |
| (2) Funeral expenses. | (4) Validity of order. Effect of. |
| (3) Expenses of administration. | 10. Payment of interest-bearing claims. |
| 7. Property available for payment of debts. | 11. "Contingent" claims. |
| (1) In general. | 12. Deficiency. Part payment. Disputed claims. |
| (2) Community property. | 13. "Dividends." |
| | 14. Mortgages and judgments. |
| | 15. Enforcement of payment. |
| | 16. Appeal. |

1. In general. It is declared by section 1497 of the Code of Civil Procedure of California that a claim allowed and approved and filed shall "rank among the acknowledged debts of the estate, to be paid in due course of administration": Estate of Loshe, 62 Cal. 413, 415. The words "claim" and "demand," in the statute respecting the settlement of the estates of deceased persons, are synonymous: Estate of McCausland, 52 Cal. 568, 577. It has been held that an executor or administrator may lawfully make payment of a debt, although a claim therefor has not been filed against the estate, as such payment, although made in an irregular manner, releases the estate from a legal charge: Adams v. Smith, 19 Nev. 259; 9 Pac. Rep. 337, 339; but the statute of California does not allow an executor or administrator to pay even the debts due by an intestate, except in a particular way: Tompkins v. Weeks, 26 Cal. 50, 62. No executor or administrator is chargeable upon any oral promise to pay any debt of the decedent out of his own estate, except some note or memo-

random of the agreement be made in writing, etc.: *McKeany v. Black*, 117 Cal. 587, 593; 49 Pac. Rep. 710. The presumption of regularity of proceedings in the district court of Wyoming applies to its proceedings in probate matters. If, upon the allowance of an administrator's account, the balance in his hands is ordered to be paid to the person entitled thereto, both individually and as a guardian, the presumption is, that all debts of the estate have been settled: *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 685. An administrator is at all times entitled to retain in his hands ample funds to meet the claims and expenses of administration, and the expenses of the funeral and last sickness of the deceased and the allowance to his family: *Walls v. Walker*, 37 Cal. 424, 428; 99 Am. Dec. 290. The provision of the statute authorizing the executor to retain money, in certain cases, without paying debts or legacies, is to authorize him to refuse payments of debts and legacies when due, and it is because they are due that it was necessary so to provide: *Estate of Williams*, 112 Cal. 521, 527; 53 Am. St. Rep. 224; 44 Pac. Rep. 808. If a guardian's claim against his ward's estate has been allowed, he may, upon being appointed administrator of the ward's estate, pay the claim to himself: *Reed v. Hume*, 25 Utah, 248; 70 Pac. Rep. 998, 1000. The title of the heirs is subject to the performance by the administrator of all his trusts, and the heirs finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of such trusts by the administrator. One of these trusts is the payment of the debts of the decedent. Hence where the testator bound himself either to pay a sum of money, or to transfer certain shares of stock, both the money and the stock passed to his legatee charged with the burden of the performance of this obligation. One or the other was to pass from the estate, according to the exercise of the option by the executrix; and whatever title the legatee took, it was subject to the exercise of this option: *Estate of Vance* (Cal.), 93 Pac. Rep. 1010, 1011. The equitable title to the personal estate of an intestate descends to his heirs at law, subject only to the debts of the decedent. The legal title to the estate passes to the administrator, when appointed, for the purpose of enabling him to pay the debts due from the estate: *Brown v. Baxter* (Kan.), 94 Pac. Rep. 155.

2. Order of payment cannot be changed. Neither the executor, nor administrator, nor the probate court has any authority to change the order of payments prescribed by statute: *Tompkins v. Weeks*, 26 Cal. 50, 66. Hence an order directing partnership debts to be paid before the debts of the estate are paid is void, and if the representative obeys the order, the sums paid under it cannot be allowed to him until all debts of the estate are paid. In such a case, if any loss results, it must fall upon the administrator: *Tompkins v. Weeks*, 26 Cal. 50, 67.

3. Preference. No preference is given to any debt of a particular class over others of the same class, for the statute provides that if the estate be insufficient to pay all the debts of any one class, the fund must be distributed pro rata among all the debts of that class. It follows that, as the death of the defendant destroys the lien of an attachment, the debt secured thereby is not, in such a case, entitled to a preference over other debts of the same class: *Myers v. Mott*, 29 Cal. 359, 369; 89 Am. Dec. 49. A judgment against an administrator can have the effect only of a claim duly allowed against the estate, to be paid in due course, and cannot give the creditor any further rights. A claim may, on its face, be plainly a funeral expense, or an expense of the last sickness, and if allowed at all, be manifestly a preferred claim; but there is nothing in the mode of allowance which fixes its rank; and as there is no mode of allowance that can give a claim priority, it must follow that there can be no judgment establishing the validity of a claim, which the administrator or court has refused to allow, that can have that effect. Therefore, if the administrator is satisfied that a claim for medical services is valid, though not for services rendered during the last illness, and therefore not entitled to rank as a preferred claim, his allowance does not give it such rank, although on its face it purports to be for such services. It would still be an open question: *McLean v. Crow*, 88 Cal. 644, 648; 26 Pac. Rep. 596. Money expended by an administrator for insuring the property of an estate, which contract of insurance was made after the death of decedent, is not properly a claim against the estate, being an item of expense incident to preserving the property during the course of administration, and is entitled to payment prior to the payment of debts, and its allowance as a debt cannot be prejudicial to the estate: *Enscoe v. Fletcher*, 1 Cal. App. 659, 666; 82 Pac. Rep. 1075. A percentage allowed for collecting and disbursing the estate is a proper allowance to be made as an expense of administration, and may be paid in preference to funeral expenses: *Estate of Nicholson*, 1 Nev. 518, 520. In the absence of statute, the expenses of the last sickness have no priority over ordinary debts: *Grace v. Smith*, 14 Haw. 144.

4. Payment of claims prior to settlement. There is nothing in the statute which requires payment of claims against the executor for services rendered or materials furnished to the estate during administration, before they can be allowed in the settlement of his account: *Estate of Coutts*, 87 Cal. 480, 482; 25 Pac. Rep. 685. The code provides that "upon the settlement of the accounts of the executor or administrator," the court must make an order for the payment of the debts, as circumstances of the estate may require. It also provides that notice of the day of settlement of any account to be heard must be given in the manner prescribed; and it is quite apparent that if such notice is not given, there can be no valid settlement of the account,

and consequently that there can be no valid order made for the payment of the claim, especially where a portion of it is disputed. The code seems to contemplate an order for the payment of the debt only upon the settlement of the administrator's account, but if it be assumed that such an order could be made before such settlement, still it would clearly be of no force if made without notice: *Estate of Spanier*, 120 Cal. 698, 701; 53 Pac. Rep. 357. With the exception of interest-bearing claims, provided for in section 1513 of the Code of Civil Procedure of California, there can be no valid order for the payment of a claim until after an order for the settlement of an account, in which the validity, right, and the amount of the claims, and the balance on hand, has been adjudicated; and the notice required is notice of the time and place of settling the account: *Estate of McDougald*, 143 Cal. 476, 483; 77 Pac. Rep. 443; 79 Pac. Rep. 878, 879. An administrator is not authorized to pay a claim that has not been presented according to law: *Estate of Kain*, 17 Haw. 514, 515.

5. Premature or unauthorized payments. Advancement. By paying claims in advance of an order by the court, an executor or administrator takes the risk of securing the approval of his act by the court when his accounts and vouchers shall have been presented: *Rostel v. Morat*, 19 Or. 181; 23 Pac. Rep. 200. Where payments are not authorized by present order of the court, they are made at the peril of the executor or administrator, and, to the extent that they are not approved by the subsequent order of the court, constitute a wrongful use of the money of the estate for the personal advantage of one of the executors, or all of the executors consenting to such use: *Miller v. Lux*, 100 Cal. 609, 615; 35 Pac. Rep. 345, 639. But, though debts are paid without any order or direction of the court, the court has power to allow them as claims upon the settlement of the annual account, and though such allowance is ill-advised or erroneous, it is conclusive upon the estate, if no appeal has been taken from the order approving the account: *Estate of Fernandez*, 119 Cal. 579, 583; 51 Pac. Rep. 851. If payments have been made by an executor before his appointment, and he did not at the time intend to charge the deceased, and did not afterwards present a claim to the court against the estate, the item should be disallowed in the settlement of his account: *Estate of Pease*, 149 Cal. 167; 85 Pac. Rep. 149, 150. See also *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842. If an executor or administrator pays his attorney, without any authority of the court, out of funds belonging to the estate, and his claim therefor against the estate is disallowed, no order to compel the attorney to make restitution will be granted, as the representative himself is personally answerable for the amount paid: *Estate of Sullivan*, 36 Wash. 217; 78 Pac. Rep. 945, 948. There may be cases in which the conclusion reached will operate as a hardship to the executor or administrator, who in perfect good

faith pays out money under the orders of the court. Thus if, in his haste to pay a widow, he draws his check in her favor two days before the court directs him to do so, and two days before she elects to waive her right to specific property, and in lieu thereof to accept its value in money, and the payments made to her by the representative are made with knowledge of the power of the court, for good cause shown to annul and set aside the orders, under which the representative acted, it has been held that where such orders were improperly obtained through mistake, or by means of fraud perpetrated upon the creditors or upon the court, it was entirely within the jurisdiction and power of the court to vacate them, and that under such circumstances it would vacate them and declare them void notwithstanding the payment made by the representative: *Clemes v. Fox*, 25 Col. 39; 53 Pac. Rep. 225, 229. An executor or administrator, who has been removed, has no right to pay debts or claims against the estate he represented: *Rutenick v. Hamakar*, 40 Or. 444; 67 Pac. Rep. 196. And an executor or administrator has no right, after notice, to pay a claim to the assignor thereof: *Estate of Cummins*, 143 Cal. 525; 77 Pac. Rep. 479. The unauthorized payment of a debt due to an estate does not absolve the debtor from liability to such estate: *McCoy v. Ayers*, 2 Wash. Ter. 307; 5 Pac. Rep. 843. If a father voluntarily pays a mortgage on his daughter's lands for her benefit, and takes an assignment in blank of the mortgage and note to be secured to hold for her benefit, and keeps them in his possession until his death, such payment will be deemed an advancement out of his estate to her: *Johnson v. Eaton*, 51 Kan. 708; 33 Pac. Rep. 597.

6. Funeral expenses. Monuments, etc. Expenses of administration.

(1) **Burial.** It is the duty of an executor, or of an administrator, to give a decedent a decent burial, and he cannot be absolutely limited in the performance of such duty by the provisions of a will: *Estate of Galland*, 92 Cal. 293, 295; 28 Pac. Rep. 288. But, though he is required by law to pay the funeral expenses, he is not, as against the objections of the persons entitled to the custody of the body of the decedent for the purpose of burying it, entitled, in this country (though he is in England), to the custody and possession of the body of his decedent, until it is properly buried. The custody of the corpse and the right of burial do not belong to the executor or administrator, but to the next of kin, and the court possesses the power to protect such next of kin in the exercise of such rights: *Enos v. Snyder*, 131 Cal. 68, 71; 82 Am. St. Rep. 330; 63 Pac. Rep. 170; 53 L. R. A. 221.

(2) **Funeral expenses.** At common law the husband was bound to bury his deceased wife in a suitable manner, and was bound to defray the necessary funeral expenses. Although the rule is not universal in this country, it prevails in most of the states. The duty is one which

is involved in the obligation of the husband to maintain the wife, while living. He has the control of the body of his deceased wife, and must care for the same, and must select a proper place for her interment, regardless of the wishes of her parents or other relatives. And whether or not the administrator ought to be allowed anything on account of the monument erected over her grave depends on circumstances. Included in the obligation to give the deceased wife a decent burial, is the duty of placing some mark of identification over her last resting-place. If the husband be poor, and the deceased leave a considerable estate, the former ought not to be expected to contribute much to a monument, and it would be proper, in such a case, for the court to fix a reasonable amount to be allowed for that purpose. The amount allowed for the expenses of a funeral and a monument should be governed by the custom of the people of like rank and condition in society. A distinction is made in this respect, however, between solvent and insolvent estates: *Estate of Weringer*, 100 Cal. 345, 346; 34 Pac. Rep. 825. The expenses of erecting a monument at the grave of a deceased person is part of the funeral expense, and properly payable out of the estate: *Van Emon v. Superior Court*, 76 Cal. 589, 590; 9 Am. St. Rep. 258; 18 Pac. Rep. 877. Even where there is no testamentary disposition or direction that a monument be erected over the grave of the testator, the courts will allow a reasonable sum to be paid out of the funds of the estate for the erection of such a monument, putting the expense on the ground of funeral expenses: *Estate of Koppikus*, 1 Cal. App. 84, 87; 81 Pac. Rep. 732. The word "monument," in common usage, when it relates to a memorial for the dead, means shaft, column, or some structure more imposing than a mere gravestone. It is not understood to be a memorial building. Hence, if a testator leaves funds to be used by his executors for funeral expenses, and for the proper interment of his remains, and "for a suitable monument to his memory," a memorial building is without the purview of the testator's bequest: *Fancher v. Fancher*, 35 Cal. Dec. 213, 214 (Sept. 4, 1908).

REFERENCES.

Liability of separate estate of wife for her funeral expenses: See note 6 L. R. A. (N. S.) 917, 918. Liability of decedent's estate for funeral expenses: See note 33 L. R. A. 660, 669.

(3) **Expenses of administration.** Claims against an estate are those in existence at the death of deceased. Other claims against the estate are those incurred by the administrator or executor in settling the estate, and are properly denominated "expenses of administration": *Dodson v. Nevitt*, 5 Mont. 518; 6 Pac. Rep. 358; 38 Cal. 85; 99 Am. Dec. 352. The fees of an administrator or executor are expenses of administration, to be allowed in preference even to funeral expenses: *In re Nicholson*, 1 Nev. 518, 520. Insurance-money paid on

the property of the estate is also an expense of administration, unless it was paid under circumstances showing recklessness and a want of proper care and prudence: *In re Nicholson*, 1 Nev. 518, 521. Expenses incurred by executors, in proceedings to contest the will of a decedent, are, if reasonable, expenses of administration: *Notley v. Brown*, 16 Haw. 575, 577. Taxes are an expense in the care and management of an estate: *People v. Olvera*, 43 Cal. 492, 494. Repairs to the roof of a dwelling-house where the widow resided, after it was consumed by fire, and which were made, at the request of the widow, by order of the probate court, are a necessary expense in the proper administration of the estate to preserve the dwelling from ruin and decay: *In re Thorn's Estate*, 24 Utah, 209; 67 Pac. Rep. 22, 23.

7. Property available for payment of debts.

(1) **In general.** Moneys in the hands of an executor or administrator are not assets applicable to the payment of a claim against the estate of a decedent until its payment has been directed by a court of probate: *United States v. Eggleston*, 4 Saw. 199; Fed. Cas., No. 15,027. If a testator dies, leaving one half of his property not disposed of by will, and without having made any provision for the payment of debts and expenses, such debts and expenses of administration are properly chargeable against the property undisposed of by will: *Estate of Travers*, 145 Cal. 508; 78 Pac. Rep. 1058, 1060. The fair meaning of the language of section 1562 of the Code of Civil Procedure of California, that "if the estate appropriated therefor is insufficient to pay the debts, expenses of administration," etc., resort shall be had to that portion of the estate undisposed of for their payment, is, that, where no estate is appropriated by will, or that which is appropriated is inadequate, such resort shall be had. Where a will fails to make any appropriation to pay the debts and charges against the estate, there is clearly an insufficient appropriation for that purpose. The absence of all appropriation is certainly an insufficient one: *Estate of Travers*, 145 Cal. 508; 78 Pac. Rep. 1058, 1060. The word "estate" is used in sections 1645 and 1648 of the Code of Civil Procedure of California as signifying all the decedent's property: *Estate of Hinckley*, 58 Cal. 457, 515. All of the estate of the testator is made assets in the hands of the administrator for the payment of all debts of every kind, whether simple contract debts, specialty debts, or otherwise, or whether charged upon particular estates or not. One class of creditors is not to look to the executor alone, and another class, in default of the assets in the hands of the executor, is not obliged to follow the heir, devisee, or specific legatee. The entire estate, real and personal, is liable in the hands of the executor to the charge of all the debts: *Estate of Woodworth*, 31 Cal. 595, 613. The court has power to set aside a homestead upon property to the value of thirty or forty thousand dollars, and in some instances it has done so. It might be

that this was all the property of the estate, but it would not only be an anomaly, but a great injustice, if the creditors were to be left remediless because the court had set aside such a homestead to the widow during her widowhood. It is certainly more in consonance with natural justice and with a spirit of our jurisprudence to say that when the dependent family have been protected in their needs the law will next consider the claims of bona fide creditors, and that only after this is done shall the heirs take. Even so, they get all the deceased could have given them had he lived; that is to say, the residue of his property after the payment of his just debts: *Estate of Tittel*, 139 Cal. 149, 152; 72 Pac. Rep. 909.

(2) **Community property.** The property of the community is undoubtedly liable for the payment of its debts: *Packard v. Arrelanes*, 17 Cal. 535, 538.

(3) **Rents and profits.** If a testator bequeaths all shares of stock of a corporation, standing in his name at the time of his death, to trustees to hold for a specified term, and to distribute dividends arising from the stock semiannually among the beneficiaries named, and there is no doubt that it was the testator's intention to vest the trustees named with the title to the stock mentioned, the bequest is specific where the description is particular enough to identify the subject-matter of the testamentary gift. Hence the corpus of the shares of stock is exonerated from liability on account of the debts of decedent's estate, until a resort thereto becomes necessary by reason of a failure to discharge such obligations from the proceeds of the sales of the remaining property, not specifically devised or bequeathed; and the conclusion reached in regard to the shares of stock also applies to the profits accruing from conducting the business of the corporation: *In re Noon's Estate (Or.)*, 88 Pac. Rep. 673, 676; 90 Pac. Rep. 673. For circumstances under which it is the duty of the executor or administrator to apply rents accruing from property of the estate to its debts, see *Smith v. Goethe*, 147 Cal. 725; 82 Pac. Rep. 384, 390. If it becomes necessary to resort to the realty for the payment of debts, the rents collected from it should first be exhausted before the sale of the realty itself. As between the legatees of the personalty and the devisees of the realty, the executor is not authorized to appropriate the rents of the real estate accrued subsequent to the decease of the testator, to the satisfaction of a mortgage debt in exoneration of the personalty: *Estate of Woodworth*, 31 Cal. 605, 609.

(4) **Property bequeathed or devised.** Section 1822 of the Civil Code of Montana provides: "The property of a testator, except as otherwise specially provided for in this code and the Code of Civil Procedure, must be resorted to for the payment of debts in the following

order: 1. The property which is expressly appropriated by the will for the payment of the debts. 2. Property not disposed of by will. 3. Property which is devised or bequeathed to a residuary legatee. 4. Property which is not specifically devised or bequeathed; and 5. All other property ratably." No distinction is made in this section between devises for charitable purposes and those made upon consideration. They are placed upon the same footing. If the property mentioned in the first four classes designated by the statute is not sufficient, specific devises, no matter for what purpose, are to be resorted to ratably; for such devises clearly fall within the fifth class in the enumeration. Devisees have no right to have property devised to them for a valuable consideration, no matter what that consideration may have been, exempted from sale for the payment of debts, or the sale of it postponed until other property specifically devised has been resorted to for that purpose. No distinction is made among specific devises, but all must bear the burden ratably: *In re Tuohy's Estate*, 33 Mont. 230; 83 Pac. Rep. 486, 490. If the law, at the time of a testator's death, provided that his personal property, not specifically bequeathed, should be primarily liable for the payment of his debts, etc., but such law is changed, pending administration of his estate, so as to authorize a sale of his real property for the payment of debts before disposing of the personal property, where the interest of the parties would be subserved by such sale, the rights of devisees are not impaired by such change in the law. Hence if the testator left personal property not specifically bequeathed, the court has no power to order a sale of the real property until the proceeds of a sale of the personal property are exhausted. The devisees become seised of the real property devised to them upon the death of the decedent, and their rights thereto cannot be defeated or impaired by subsequent legislation attempting to subject their land to a liability not imposed thereon when they become invested with the legal title thereto: *In re Noon's Estate (Or.)*, 88 Pac. Rep. 673, 675; 90 Pac. Rep. 673. See also head-line 7, subd. 3, *supra*.

8. Marshaling of assets. Under the common law, where no different order is prescribed or indicated in the will, as between executors, devisees, and heirs, the assets of the deceased, for the purpose of paying the debts of the estate, will be marshaled, and the debts paid out of them, in the following order: 1. The general personal estate, — that is to say, personal estate not specifically bequeathed, or expressly or by implication excepted. 2. Lands expressly devised for the payment of debts. 3. Lands descended to the heir. 4. Lands devised. It is also the settled rule of English and of American law that this order is not to be disturbed by the fact that lands are devised subject to a mortgage or encumbrance thereon. The personal estate is first to be applied and exhausted, even for the payment of the debts charged

upon the real estate by mortgage or other encumbrance, if the debt so charged upon it was the personal debt of the testator; for the mortgage is regarded merely as a personal security. And when the testator devises lands expressly subject to a mortgage, he is considered as using the terms merely as descriptive of the encumbered condition of the property, and not for the purpose of subjecting his devisees to the burden. It requires express words, or an intent clearly manifest upon an examination of the entire will, to disturb this order. There must be a manifest intent, not merely to charge the real estate, but to discharge the personalty: *Estate of Woodworth*, 31 Cal. 595, 599. Where the entire estate, both real and personal, has been devised without any provision in the will as to the payment of debts, and the will contains no specific devises or legacies, it results that the devisees under the will, or rather their respective shares, must contribute to the payment of the debts and expenses in proportion to their value: *Estate of Woodworth*, 31 Cal. 595, 619. In case of doubt as to a claim for services rendered during the last illness of deceased, the administrator may refuse to pay until required by an order of the court. When the assets are at last marshaled, the order of payment must be determined by the probate court, when other creditors may be heard: *McLean v. Crow*, 88 Cal. 641, 647; 26 Pac. Rep. 596.

9. Decree or order for payment.

(1) **In general.** An executor or administrator may be required by the decree of the probate court to pay over to creditors or legatees the kind of money received by him: *Magraw v. McGlynn*, 26 Cal. 420, 428. In Colorado, the district court is not authorized to decree that a judgment rendered by it against an executor or administrator shall be allowed as a claim of a designated class, as this is a usurpation of the province of the probate court: *Hotchkiss v. First Nat. Bank (Col.)*, 85 Pac. Rep. 1007, 1008. A decree of the probate court for the payment of creditors binds the executor or administrator personally for the amount of the claim of each creditor, or the dividend thereon; and the decree is a judicial determination of the rights of the parties, and possesses all the elements of a final judgment. Such decree, like the judgment of any other court rendered in the exercise of competent jurisdiction, cannot be assailed in a collateral proceeding, or in any other proceeding on the ground of the insufficiency of the evidence upon which it was rendered: *Estate of Cook*, 14 Cal. 129, 130.

(2) **Application for order.** When the administrator finds himself with funds not needed for the purpose of paying the expenses of the funeral and last sickness of the deceased, the allowance to his family, and the necessary current and prospective expenses of administration, he ought to report that fact to the court at his next annual settlement, and obtain an order to apply them in payment of debts, though he is

at all times entitled to retain in his hands ample funds to meet the claims and expenses above mentioned: *Walls v. Walker*, 37 Cal. 424, 428; 99 Am. Dec. 290. If he neglects to apply for an order of sale when it is necessary, any person may make application therefor, in the same manner as the executor or administrator. The law affords to creditors of the executor or administrator, as well as to the creditors of the decedent, the means of securing payment of their claims against the estate, and necessarily contemplates expenses of administration which the executor neglects or refuses to pay: *Estate of Coutts*, 87 Cal. 480, 482; 25 Pac. Rep. 685.

(3) **Duty of court. Granting of order.** If the representative of the estate has a doubt as to the legality of a claim presented, or the amount that should be paid for services rendered, or materials furnished, in the course of administration, it is proper for his own protection, as well as for the protection of the heirs, that the court should determine, after notice to all persons interested, whether the estate is liable at all, and if so, in what amount: *Estate of Coutts*, 87 Cal. 480, 482; 25 Pac. Rep. 685. The law provides that upon the settlement of the accounts of executors or administrators the court must make such an order for the payment of the debts as the circumstances of the estate require; and it is the duty of the court, when there is money on hand, to make an order for the payment of debts. If there are not sufficient funds on hand with which to pay the debts, the court must specify the sum to be paid to each creditor. Where creditors in a large amount ask for an order directing the executor or administrator to pay debts of the estate, and there is money on hand, they are entitled to such order, or to an order directing a dividend to the extent that the funds on hand will justify: *Estate of Sylvar*, 1 Cal. App. 35; 81 Pac. Rep. 663, 664.

(4) **Validity of order. Effect of.** Where the executors received legal-tender notes in payment for property sold by them for the benefit of creditors, it was held to be error for the probate court to order payment to the creditors to be made in gold coin: *Estate of Den*, 39 Cal. 70, 71. An order for the payment of a debt, made without notice of the settlement of the administrator's account, is of no force: *Estate of Spanier*, 120 Cal. 698, 701; 53 Pac. Rep. 357; *Estate of McDougald*, 143 Cal. 476, 483; 77 Pac. Rep. 443; 79 Pac. Rep. 878, 879. A valid order for payment of a particular creditor's claim, whether or not his claim be a preferred claim, cannot, at least in the case of an insolvent estate, be made except upon the settlement of an account of the administrator after notice, given as prescribed by the code. Otherwise the other creditors would not be bound by the order; and if the administrator should obey it, he would do so at his peril: *Estate of Smith*, 117 Cal. 505, 508; 49 Pac. Rep. 456. The executor or administrator is

answerable for the assets in his hands, and, so long as he remains in office, is entitled to retain them in his possession until disposed of, to the party entitled thereto, under the directions of the court. Upon the entry of an order for the payment of the claims against the estate, the administrator becomes answerable therefor to the creditors, both personally and upon his bond, and each creditor is entitled to an execution against him therefor. He cannot escape this liability by complying with an order which the court has no power to make, such as an order to pay the balance of the estate into court, and that he thereupon be discharged: *Estate of Sarment*, 123 Cal. 331, 337; 55 Pac. Rep. 1015. If an order directing the payment of debts is based upon an erroneous order of settlement of accounts, both orders must fall together: *Estate of Grant*, 131 Cal. 426, 430; 63 Pac. Rep. 731.

10. Payment of interest-bearing claims. Section 1513 of the Code of Civil Procedure of California, which provides for the payment of interest-bearing claims, is not designed for the benefit of creditors, but for the benefit of the estate. It affords no right to the owner of a debt, although it is a preferred claim bearing interest, to compel an advance payment of it. The order directing the administrator to pay should be, in its form, not compulsory, but permissive merely. Then he may pay or not, as his discretion suggests, and if the condition of the estate warrants. If he does not pay, he cannot be compelled to do so by the creditor, but will be answerable to the estate for the interest accruing thereafter, if he cannot show that his refusal was based on sound reasons: *Estate of Hope*, 106 Cal. 153, 155; 39 Pac. Rep. 523.

11. "Contingent" claims. The court has no power to order a contingent claim paid, unless it has been presented within the time prescribed by law: *Verdier v. Roach*, 96 Cal. 467, 479; 31 Pac. Rep. 554. A matured mortgage indebtedness against an estate before foreclosure is not a "contingent" claim, within section 1648 of the Code of Civil Procedure of California. That section contemplates that an amount shall be paid into court for the benefit of such contingent claim equal to the amount that would be payable thereon if the whole of it were established as absolute. The court is not authorized, under such section, to take testimony to ascertain the probable deficiency which might arise on foreclosure: *Estate of McDougald*, 146 Cal. 196, 201; 79 Pac. Rep. 875.

12. Deficiency. Part payment. Disputed claims. The Kansas statute is construed to mean that judgments which are liens upon real estate of the deceased, where the estate is insolvent, shall, to the extent of the lien, be paid without reference to classification, with the exception therein stated, but the deficiency shall only be paid as other judgments rendered against the deceased in his lifetime are paid: *Wolfe v.*

Robbins, 10 Kan. App. 202; 63 Pac. Rep. 278. When the court orders creditors to be paid, the decree determines the amount to be paid. This amount is ascertained by reference to the money of the estate in the hands of the executor. If there is sufficient funds in his hands for the payment in full of the creditor's demand, or only enough to pay a portion of the dividend, the decree is made according to the truth of the case, and the executor or administrator is required to make payment as directed by the decree from the money of the estate in his hands, or presumed to be there: *Magraw v. McGlynn*, 26 Cal. 420, 431. If there are not sufficient funds in the hands of the executor or administrator, the court shall specify in the decree the sum to be paid to each creditor: *Pico v. De la Guerra*, 18 Cal. 422, 431; *Rostel v. Morat*, 19 Or. 181; 23 Pac. Rep. 900; *Estate of Sylvar*, 1 Cal. App. 35, 38; 81 Pac. Rep. 663; *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521. Whenever some of the creditors of an estate, whose claims have been allowed, are paid any proportion of their claims, a like proportion must be paid into the court to await the final determination of actions commenced and pending against the administrator, or claims disallowed by him: *Estate of Sigourney*, 61 Cal. 71, 72. If a claim is disputed, and is allowed in part, but is rejected in part, the court has no power to order payment of the allowed part of such disputed claim in advance of the settlement of the administrator's account, in the absence of notice of such settlement: *Estate of Spanier*, 120 Cal. 698, 701; 53 Pac. Rep. 357.

13: "Dividends." It is error for the court to order a dividend, in excess of the amount in the hands of the executor or administrator, to be paid to the creditors. In such event, the case will be remanded, with instructions to correct the error: *Estate of Dorland*, 63 Cal. 281, 282. The order for the payment of the dividend required by section 1647 of the Code of Civil Procedure of California is not, strictly speaking, a part of the proceeding for the settlement of the account, or of the adjudication respecting the claims represented therein. It follows thereon, but is not a part thereof. It may, of course, be made immediately after the account is settled, but this does not make it a part of the proceeding. On the other hand, it cannot be made until after the account is settled, and it may be deferred to a considerable time thereafter, and may be made without notice. It is a part of the proceeding for the administration of the estate, considered as a whole, but it is not specifically a part of the proceeding for the settlement of the account. The persons in whose favor such order for a dividend is made do not thereby become parties to the proceeding for the settlement of the account, in cases where they did not appear or make any objection or contest upon such settlement. Notice must be given of the time and place of settling the final account of the executor or administrator, but the notice of the time of making the order for a dividend is not required: *Estate of McDougald*, 143 Cal. 476, 480, 483;

77 Pac. Rep. 443; 79 Pac. Rep. 878, 879. Though it be conceded that the claim on a mortgage debt, which is due, and the amount thereof not disputed, is contingent, to the extent that the amount of the "proceeds" of the property mortgaged is not ascertained, and cannot be determined until there is a sale thereof, and hence that the balance that would remain after the application of such proceeds thereon is uncertain and indeterminable, still, there is nothing in the statute that warrants the taking of testimony by the court, to ascertain the probable deficiency, or the determination by the court of the probable deficiency, in any manner. The court, therefore, has no statutory authority for directing that a contingent dividend thereon be retained until the deficiency shall be determined: *Estate of McDougald*, 146 Cal. 196, 201; 79 Pac. Rep. 875. In calculating the dividend to be paid out of general assets of the estate, where there has been no sale of property mortgaged, the mortgage debt must be classed as a claim of the fifth class, and allowed a dividend estimated upon the full amount of the claim, without any deduction for the probable proceeds of a future sale: *Estate of McDougald*, 146 Cal. 196, 202; 79 Pac. Rep. 875. After the property mortgaged has been sold, and its proceeds applied to the debt, leaving a balance unpaid as to that balance, the creditor is no longer a mortgage creditor, but is entitled only to have the same paid from the fund realized from the general assets of the estate pro rata with other creditors. This rule recognizes the rights of a secured creditor to avail himself of the full benefit of his security, and also places him on an equality with the unsecured creditors as to other property of the estate, and is eminently just, because it in no way impairs the secured creditor's legal or contract rights, and affords him an equal remedy with other creditors against the general estate, thereby preserving to him the same remedy that he had against his debtor during his lifetime. Hence if a creditor holds collateral, he may collect dividends upon his entire claim, even to the extent of payment in full, in which case the security would inure to the benefit of the unsecured creditors: *Erle v. Lane*, 22 Col. 273; 44 Pac. Rep. 591, 593.

REFERENCES.

Deferring order for dividend until time for appeal from order settling a contested account has expired: See head-line 16, post. Payment of legacies: See note § 956, head-line 7, post.

14. Mortgages and judgments. A mortgagee is under no obligation to pay any other expenses than those incurred in the enforcement of the mortgage security. He cannot be subjected to any general expenses of administration: *Estate of Murray*, 18 Cal. 686, 687. After payment of the debt for which the mortgage was given, the mortgagee becomes, by operation of law, a trustee of the surplus for the mortgagor: *Pierce v. Robinson*, 13 Cal. 116, 133. Where there is a

large amount of personal property of the estate in the hands of the executor or administrator applicable to payment of the debts, the debts secured by mortgage, as between the legatee and devisees, is not all payable out of the rents of the real estate mortgage: *Estate of Woodworth*, 31 Cal. 595, 615. Although the statute authorizes an executor to retain expenses of administration in preference to any claim or charge against his testator's estate, this does not give him a lien superior in right to a mortgage on the land of the deceased, although such expenses may take precedence in order of payment over charges and claims against the estate. The justice of the rule is manifest. A mortgage would be a thing of uncertain and precarious value if the costs and expenses of administration of a deceased person were advanced to a prior right of payment over a mortgage lien: *Shepard v. Saltzman*, 34 Or. 40; 54 Pac. Rep. 883, 884. The preference of a mortgage debt is limited to the proceeds of the property, and where there are no proceeds, there can be no preference, and the mortgage debt, in such circumstances, ranks as an unsecured claim, and stands in the fifth class as to the general assets. The effect of sections 1643, 1644, and 1645 of the Code of Civil Procedure of California is, that, with respect to the proceeds of the mortgaged property, the mortgage debt shall have the preference and be first paid, and that where there are no proceeds before the court upon which such preference can operate, the claim has no preference at all, and must be classed among other demands of the estate in the fifth class. The word "proceeds" does not include the rents of property accruing before the sale, at least where they are not included in the mortgage. The rents are general assets of the estate on which the mortgage is not a lien, and in which it is entitled to no preference: *Estate of McDougald*, 146 Cal. 201, 202; 79 Pac. Rep. 875. In section 1643 of that code, wherein provision is made for the payment of debts, there is given to "judgments rendered against the decedent in his lifetime" the same preference against the general assets which is given to mortgages against the particular property covered by the lien of the mortgage. The payment of judgments "in the order of their dates" is the enforcement of their liens: *Morton v. Adams*, 124 Cal. 229, 230; 71 Am. St. Rep. 53; 56 Pac. Rep. 1038. Alimony accrued under the order of a court is a judgment, and, after the death of the judgment debtor, such judgment is a preferred claim against his estate: *Estate of Smith*, 122 Cal. 462; 55 Pac. Rep. 249. A grantee under a deed of gift cannot require payment of a mortgage debt on the property conveyed, out of the estate of the grantor, by reason of the implied covenant against encumbrances, unless provision therefor can be found in the will of the deceased grantor: *Estate of Wells* (Feb. 3, 1908), 6 Cal. App. Dec. 257, 259.

15. Enforcement of payment. After the court has decreed that the creditors of the estate be paid, the executor or administrator at

once becomes individually and personally answerable for payment so decreed to be made: *Magraw v. McGlynn*, 26 Cal. 420, 432. Upon the entry of an order for the payment of the claims against the estate, the executor or administrator becomes liable therefor to the creditors, both personally and upon his bond, and each creditor is entitled to an execution against him therefor: *Estate of Sarment*, 123 Cal. 331, 337; 55 Pac. Rep. 1015. A decree for the payment of money in probate proceedings cannot be enforced as for a contempt. The proper process is an execution: *Rostel v. Morat*, 19 Or. 181; 23 Pac. Rep. 900. Where there has been no administration of the estate, and no ascertainment of the assets and liabilities, a creditor is not entitled to have property of the estate, or any portion of it, applied to the discharge of his claim, in whole or in part, except in due course of administration: *Peabody v. Hutton*, 5 Wyo. 102; 37 Pac. Rep. 694; 39 Pac. Rep. 980.

16. Appeal. Although the probate court makes an order adjudging that a claim against the estate is a preferred claim, and that such claim be paid in due course of administration, and no appeal is taken from such order, the executor or administrator is entitled to appeal from a second order directing payment of the claim as a preferred claim, where such second order was made before the amount of the distributable estate was ascertained, and the accounts of the administrator settled, and without notice of the settlement of the account of the administrator, as he is a party aggrieved by such premature order: *Estate of Smith*, 117 Cal. 505, 507; 49 Pac. Rep. 456. The decisions do not declare that the order for a dividend must be made at the same time as the order settling the account. In substance, they decide that the first-mentioned order must follow the latter. Doubtless the order for a dividend is, in practice, usually included in the same entry in the minutes with the order settling the account, and immediately following, and this is proper when the order is made on the same day. But there may be reason for delay in ordering the dividend, and the court has as much power to make it on a subsequent day as it has on the day the account is settled. It is evident that the order for a dividend is, in many respects, dependent on the order settling the account, so that if an appeal is taken from the latter it must, perforce, suspend the effect of the former, and prevent its enforcement against the will of the administrator until the latter becomes final. Hence there will be no impropriety in deferring the making of an order for a dividend until the time for appeal settling a contested account has expired, or if an appeal has been taken, until such appeal is determined: *Estate of McDougald*, 143 Cal. 476, 483; 77 Pac. Rep. 443; 79 Pac. Rep. 878, 879. Where the court has settled the administrator's account and ordered that a dividend be declared upon the claims reported, and that the administratrix pay the same out of the balance adjudged to be on hand, and the administratrix takes separate appeals from these orders, — one in her capacity as administratrix of the estate, and the

other as a creditor — and only one of the creditors files any objection to the account, it cannot be contended, on appeal, that the creditors who did not appear, nor make any objections to the account as rendered, are directly interested in the result of the appeal; nor can it be urged that, under section 1649 of the Code of Civil Procedure of California, an order for the payment of a dividend has the effect of a several judgment in favor of each creditor against the administratrix, and that this makes each creditor a party of record to the proceedings. The word "party" should not be given so broad a meaning. That a person interested in an estate, although his name and his interest is disclosed on the face of the record, is not necessarily a party to the cause or proceeding, is manifest from a consideration of the different cases where persons interested may or may not appear, at their option. In a proceeding to probate a will, any person interested, whether a devisee, legatee, or heir, may appear and contest the probate. The petition for probate must show the names of the heirs and devisees, and hence their interest must always appear in the record. Yet, it would not be contended that an heir, devisee, or legatee who fails to appear at the time of the hearing of the petition is, in any sense, a party to such proceeding. So, with the petition for administration, there may be many persons who are entitled to letters and who are interested in the matter of the appointment. But if they fail to appeal or contest the right of the petitioner, it is manifest that they cannot be considered parties. Upon the settlement of an account, every creditor, heir, legatee, or devisee is a person interested, and as such has a right to enter an appearance and become a party. The names of these persons generally appear upon the face of the account, or upon some of the documents referred to therein, but the giving of notice of the settlement and the statement of their rights or claims does not, ipso facto, make them parties to the proceeding. The only effect of notice is to give them an opportunity to become parties, so that, if they desire, they may appear and make themselves parties in some appropriate manner: *Estate of McDougald*, 143 Cal. 476, 478, 479; 77 Pac. Rep. 443; 79 Pac. Rep. 878, 879.

PART XII.

PARTITION, DISTRIBUTION, AND FINAL SETTLEMENT OF ESTATES. ABSENT INTERESTED PARTIES. ACCOUNTS OF TRUSTTES.

CHAPTER I.

PARTIAL DISTRIBUTION PRIOR TO FINAL SETTLEMENT.

- § 712. Payment of legacies upon giving bonds.
- § 713. Notice of application for legacies.
- § 714. Executor or other person may resist application.
- § 715. Partial distribution. Decree to be granted when. Bond. Delivery. Partition. Costs.
- § 716. Form. Petition for share of estate before final settlement.
- § 717. Form. Notice of application for share of estate before final settlement.
- § 718. Form. Memorandum, by clerk, fixing time for hearing for partial distribution.
- § 719. Form. Executor's resistance to application for partial distribution.
- § 720. Form. Order directing executor to pay a legatee his share of an estate.
- § 721. Form. Order for partial distribution.
- § 722. Form. Bond on distribution before final settlement.
- § 723. Form. Justification of sureties.
- § 724. Form. Order for partial distribution without bond.
- § 725. Order for payment of money secured by bond. Citation. Action on bond.
- § 726. Form. Petition for order directing legatee, etc., to refund money for payment of debts.
- § 727. Form. Order that legatee, etc., refund money to pay debts.

PARTIAL DISTRIBUTION.

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| 1. Power of courts. | 5. Hearing. |
| 2. Petition. | 6. Order. |
| 3. Notice. | 7. Other matters. |
| 4. Bond. | 8. Appeal. |

§ 712. Payment of legacies upon giving bonds. At any time after the lapse of four months from the issuing of letters testamentary or of administration, any heir, devisee, or legatee may present his petition to the court for the legacy or share of the estate to which he is entitled, or any portion thereof, to be given to him upon his giving bonds, with security, for the payment of his proportion of the debts of the estate. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 504), § 1658.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 882, p. 326.
- Arizona.** Rev. Stats. 1901, par. 1886.
- Colorado.** 3 Mills's Ann. Stats., sec. 4803.
- Idaho.** Code Civ. Proc. 1901, sec. 4270.
- Montana.** Code Civ. Proc., sec. 2830.
- Nevada.** Comp. Laws, sec. 2993.
- North Dakota.** Rev. Codes 1905, § 8203.
- Oklahoma.** Rev. Stats. 1903, sec. 1750.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1222.
- South Dakota.** Probate Code 1904, § 302.
- Utah.** Rev. Stats. 1898, sec. 3948.
- Washington.** Pierce's Code, § 2671.
- Wyoming.** Rev. Stats. 1899, sec. 4826.

§ 713. Notice of application for legacies. Notice of the application must be given to the executor or administrator, personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator. **Kerr's Cyc. Code Civ. Proc., § 1659.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 883, p. 327.
- Arizona.*** Rev. Stats. 1901, par. 1887.
- Idaho.*** Code Civ. Proc. 1901, sec. 4271.
- Montana.*** Code Civ. Proc., sec. 2831.
- Nevada.** Comp. Laws, sec. 2994.
- North Dakota.** Rev. Codes 1905, § 8204.
- Oklahoma.*** Rev. Stats. 1903, sec. 1751.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1223.
- South Dakota.*** Probate Code 1904, § 303.

Utah. Rev. Stats. 1898, sec. 3948.

Washington. Pierce's Code, § 2672.

Wyoming.* Rev. Stats. 1899, sec. 4827.

§ 714. Executor or other person may resist application.

The executor or administrator, or any person interested in the estate, may appear at the time named and resist the application. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 504), § 1660.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1888.

Idaho. Code Civ. Proc. 1901, sec. 4272.

Montana. Code Civ. Proc., sec. 2832.

Nevada. Comp. Laws, sec. 2995.

North Dakota. Rev. Codes 1905, § 8205.

Oklahoma. Rev. Stats. 1903, sec. 1752.

South Dakota. Probate Code 1904, § 304.

Washington. Pierce's Code, § 2673.

Wyoming. Rev. Stats. 1899, sec. 4828.

§ 715. Partial distribution. Decree to be granted when.

Bond. Delivery. Partition. Costs. If, at the hearing, it appears that the estate is but little indebted, and that the share of the party applying may be allowed to him without loss to the creditors of the estate, the court must make an order in conformity with the prayer of the applicant, requiring:

1. **[Bond to be executed by heir, etc.]** Each heir, legatee, or devisee, obtaining such order, before receiving his share, or any portion thereof, to execute and deliver to the executor or administrator a bond, in such sum as may be designated by the court, or a judge thereof, with sureties to be approved by the judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from the estate, not exceeding the value or amount of the legacy or portion of the estate to which he is entitled. Where the time for filing or presenting claims has expired, and all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court is satisfied that no injury

can result to the estate, the court may dispense with the bond;

2. **[Delivery to heir.]** The executor or administrator to deliver to the heir, legatee, or devisee, the whole portion of the estate to which he may be entitled, or only a part thereof, designating it.

[Manner of making partition.] If, in the execution of the order, a partition is necessary between two or more of the parties interested, it must be made in the manner hereinafter prescribed. The costs of these proceedings must be paid by the applicant, or if there are more than one, must be apportioned equally among them. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 504), § 1661.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, secs. 883, 884, p. 327.

Arizona. Rev. Stats. 1901, par. 1889.

Colorado. 3 Mills's Ann. Stats., sec. 4803.

Idaho. Code Civ. Proc. 1901, sec. 4273.

Kansas. Gen. Stats. 1905, § 2987.

Montana. Code Civ. Proc., sec. 2833.

Nevada. Comp. Laws, secs. 2996, 2997, 2998, 2999.

North Dakota. Rev. Codes 1905, § 8206.

Oklahoma. Rev. Stats. 1903, sec. 1753.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1223, 1224.

South Dakota. Probate Code 1904, § 305.

Utah. Rev. Stats. 1898, sec. 3949.

Washington. Pierce's Code, §§ 2674, 2675, 2676, 2677.

Wyoming. Rev. Stats. 1899, sec. 4829.

§ 716. Form. Petition for share of estate before final settlement.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____,
State of ____.

Your petitioner respectfully represents that he is a ____⁴
of ____, deceased, and one of his heirs at law,⁵ and is
entitled to ____⁶ of the residue of said estate, after the
payment of debts, costs, expenses, and charges of adminis-
tration;

That said deceased died intestate; that — is the administrator of said estate; and that more than four months have elapsed since the issuance of letters of administration of said estate;

That the total value of said estate, as appears by the inventory and appraisement on file in said court, is the sum of — dollars (\$—); that your petitioner is informed and believes, and therefore states, that there are no claims against said estate;⁷ that the debts outstanding against said estate, together with the costs, expenses, and charges of administration, will probably not exceed the sum of — dollars (\$—); and that petitioner's⁸ share of said estate hereinafter described can be allowed to him without loss to the creditors of the estate;

That the only other heirs⁹ of said deceased are —, —, and —, all residents of the said county¹⁰ of —, state of —.

The following is a description of the property of which distribution is hereby asked: —.¹¹

Wherefore your petitioner prays that this court cause notice of his application to be given; and that it make an order distributing to him the share of said estate above described to which he is entitled, upon his giving to said administrator the bond required by law, and for such other or further order as may seem meet. —, Petitioner.

—, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. State relationship. 5. Or, devisee or legatee, according to the fact. 6. Give fractional part to which petitioner is entitled. 7. Or, that it is but little indebted, stating the amount of claims. 8. Or, that portion of petitioner's share, etc. 9. Or, devisees or legatees. 10. Or, city and county. 11. Describe the property.

§ 717. **Form. Notice of application for share of estate before final settlement.**

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

Notice is hereby given to —, the administrator² of said estate, and to all persons interested therein, That —, on

the ____ day of ____, 19__, filed with the clerk of this court his petition praying for an order of said court distributing to him, before final settlement, his legacy or share of said estate, to which he is entitled, upon his delivering to said administrator³ the bond required by law;

And that ____,⁴ the ____ day of ____, 19__, at the court-room of said court,⁵ in said county⁶ of ____, at the hour of ____ o'clock in the forenoon⁷ of said day, have been fixed by the court as the time and place for the hearing of said petition, when and where any person interested in said estate may appear and resist said application, if he sees fit to do so. ____ , Clerk of the ____ Court.

Dated ____, 19__.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2, 3. Or, executor. 4. Day of week. 5. State location of court-room. 6. Or, city and county. 7. Or, afternoon.

§ 718. Form. Memorandum, by clerk, fixing time for hearing for partial distribution.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

____, heir² of ____, deceased, having this day filed and presented a petition praying for a decree of partial distribution to him of certain ____ of said estate described and set forth in said petition, —

Now, I, ____, clerk of said ____³ court, do hereby fix and appoint ____,⁴ the ____ day of ____, 19__, at ____ o'clock in the forenoon of said day, and the court-room of said court, at the court-house in the county of ____, as the time and place for the hearing upon said petition.

Notice is further given, That ____ is the administrator⁵ of said estate. ____ , Clerk of the ____ Court.

Dated ____, 19__.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, devisee or legatee. 3. Title of court. 4. Give day of week. 5. Or, executor of the last will of said deceased, etc.

§ 719. Form. Executor's resistance to application for partial distribution.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The application of —, one of the legatees under the last will and testament of —, deceased, having been presented to this court, with a prayer that the court make an order distributing to him the share of said estate to which he is entitled, —, the executor of said last will and testament, now objects to the granting of said petition, on the ground that its allegations are not true, and avers that said estate is deeply in debt,² and that the share of petitioner cannot be allowed to him without loss to the creditors of said estate. Hence such executor resists said petition, and asks that it be denied.

—, Executor of the Estate of —, Deceased.

—, Attorney for Executor.

Explanatory notes. 1. Give file number. 2. And other reasons, if any, specifying each one.

§ 720. Form. Order directing executor to pay a legatee his share of an estate.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It appearing that —, a legatee under the last will and testament of —, deceased, has filed in this court his petition for an order directing —, the executor of said will, to pay him the legacy of — dollars (\$—) given him by said will, and the matter, after due notice of hearing given as required by law, coming regularly on this day² to be heard, and being submitted for decision, the court finds that said estate is but little indebted; and that the share of said petitioner may be allowed to him without loss to the creditors of said estate, —

It is therefore ordered, That —, the executor of said will, pay the said petitioner, —, the sum of — dollars

(\$——) in full of his legacy, upon delivery to him, the said executor, of a bond in the sum of —— dollars (\$——),³ with sureties to be approved by the judge of this court, payable to said executor, conditioned for the payment, whenever required, of his proportion of the debts of the estate, not exceeding the amount of said legacy.

Dated ——, 19——. ——, Judge of the —— Court.

Explanatory notes. 1. Give file number. 2. Or, if the matter has been continued, say, "and the same having been by the court regularly postponed to the present time." 3. In such sum as shall be designated by the court, or a judge thereof.

§ 721. Form. Order for partial distribution.

[Title of court.]

[Title of estate.]	{ No. —— ¹ Dept. No. ——
	{ [Title of form.]

Now comes ——,² the petitioner herein, by ——, his attorney, and shows to the court that his petition for partial distribution herein was filed on the —— day of ——, 19——; that on the same day the clerk appointed the —— day of ——, 19——, as the day for the hearing thereof; that notice of the time and place of said hearing has been duly given as required by law;³ and the said petition being now presented to the court, and no person appearing to contest the same,⁴ the court, after hearing the evidence, finds that said estate is but little indebted, and that the share of the petitioner asked for may be allowed to him without loss to the creditors of said estate; and grants said petition as follows, to wit:

It is ordered by the court, That the said ——, ——, and ——, shall each, before receiving his interest, or any portion thereof, execute and deliver to the —— of said estate a bond in the penal sum of —— dollars (\$——), to be approved by the court or judge, payable to the executor or administrator, and conditioned for the payment, whenever required, of his proportion of the debts due from said estate, not exceeding the value of the portion thereof to which he is entitled; and that the said ——, as administrator⁵ of said estate, deliver to the said person so executing said bond the portion of said estate as follows, to wit:

To the said —, upon the giving by him of the bond required as aforesaid, the following portion thereof: —.⁶

To the said —, upon the giving by him of the bond required as aforesaid, the following portion thereof: —.⁷

And to — and — each a —⁸ part thereof, etc. The residue so distributed to said last-named persons is described as follows, to wit: —.⁹

Dated —, 19—, —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Name the petitioner, observing that the court has no power to order partial distribution upon the petition of an executor or administrator: *Alcorn v. Buschke*, 133 Cal. 655; 66 Pac. Rep. 15. 3. If the matter has been continued, say, "and said hearing having been regularly postponed to the present time." 4. Or, —, having appeared by —, his attorney, and filed objections and exceptions to said petition. 5. Or, executor. 6-8. State fractional part thereof. 9. Describe the residue.

§ 722. Form. Bond on distribution before final settlement.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

Know all men by these presents: That we, — as principal, and — and — as sureties, are held and firmly bound to —, the administrator² of the estate of —, deceased, in the sum of — dollars (\$—),³ lawful money of the United States of America, to be paid to the said administrator,⁴ for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such that whereas, on the — day of —, 19—, the said administrator⁵ was, by order of the —⁶ court of the county⁷ of —, state of —, duly made and entered, authorized and directed to pay over or deliver to —, one of the heirs at law of said deceased, the whole of his share of the property of said estate, upon his executing to such administrator⁸ a bond in said sum, conditioned according to law, —

Now, therefore, if the above-bounden principal shall well and truly pay, or cause to be paid, whenever required so to do, his proportion of the debts of said estate, not exceeding the value or amount of his portion of said estate, to wit, the sum of _____ dollars (\$_____) so paid or delivered to him by authority of said order, then this obligation is to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this _____ day of _____, 19____.

_____ [Seal]

_____ [Seal]

_____ [Seal]

Explanatory notes. 1. Give file number. 2. Or, executor. 3. In such sum as shall be designated by the court, or a judge thereof. 4, 5. Or, executor. 6. Title of court. 7. Or, city and county. 8. Or, executor.

§ 723. Form. Justification of sureties.

State of _____, }
County ¹ of _____, } ss.

_____ and _____, the sureties named in the above bond, being duly sworn, each for himself, and not one for the other, says he is a householder ² and resident within said state, and is worth the said sum of _____ dollars (\$_____), over and above all his debts and liabilities, exclusive of property exempt from execution.

Subscribed and sworn to before me this _____ day of _____, 19____. _____, Notary Public, etc.³

Explanatory notes. 1. Or, City and County. 2. Or, freeholder. 3. Or other officer taking the oath.

§ 724. Form. Order for partial distribution without bond.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

Now comes _____, the petitioner herein, by _____, his attorney, and shows to the court that his petition for partial dis-

tribution herein was filed on the ____ day of ____, 19__;
that on the same day the clerk appointed the ____ day of
____, 19__, as the day for the hearing thereof; and that
notice of the time and place of said hearing has been duly
given as required by law;² and the said petition being now
presented to the court, and no person appearing to contest
the same,³ the court, after hearing the evidence, finds that
said estate is but little indebted, and that the share of the
petitioner asked for may be allowed to him without loss to
creditors of the estate, and that no injury can result to the
estate therefrom, and grants said petition as follows, to wit:

It is ordered by the court, That the giving of any bond by
the said ____ before receiving his share of said estate be
dispensed with, and that the said ____, as the administrator⁴
of said estate, forthwith deliver to said ____ as⁵ his share
of said estate the following-described property, to wit:
____; ⁶ and that he shall also deliver to the said ____ as the
whole⁷ of his share of said estate, the following-described
property, to wit: ____.⁸

Dated ____, 19__. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. If the matter has been continued, say, "and said hearing having been regularly postponed to the present time." 3. Or, ____ having appeared by ____, his attorney, and filed objections and exceptions to said petition. 4. Or, executor. 5. The whole, or a part of. 6. Describe the property. 7. Or, part. 8. Describe the property.

§ 725. Order for payment of money secured by bond.
Citation. Action on bond. When any bond has been executed and delivered, under the provisions of the preceding section, and it is necessary for the settlement of the estate to require the payment of any part of the money thereby secured, the executor or administrator must petition the court for an order requiring the payment, and have a citation issued and served on the party bound, requiring him to appear and show cause why the order should not be made. At the hearing, the court, if satisfied of the necessity of such payment, must make an order accordingly, designating the amount and giving a time within which it must be paid. If the

money is not paid within the time allowed, an action may be maintained by the executor or administrator on the bond. **Kerr's Cyc. Code Civ. Proc., § 1662.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, secs. 885, 886, p. 327.
Arizona.* Rev. Stats. 1901, par. 1890.
Colorado. 3 Mills's Ann. Stats., sec. 4804.
Idaho.* Code Civ. Proc. 1901, sec. 4274.
Montana.* Code Civ. Proc., sec. 2834.
Nevada. Comp. Laws, sec. 3000.
North Dakota.* Rev. Codes 1905, § 8207.
Oklahoma.* Rev. Stats. 1903, sec. 1754.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1225, 1226.
South Dakota.* Probate Code 1904, § 306.
Utah. Rev. Stats. 1898, sec. 3950.
Washington.* Pierce's Code, § 2678.

§ 726. Form. Petition for order directing legatee, etc., to refund money for payment of debts.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 { [Title of form.]

To the Honorable the ____² Court of the County³ of ____, State of ____.

Your petitioner respectfully represents:

That on the ____ day of ____, 19____, this court, by its order duly made and entered, required him, the said petitioner, as administrator⁴ of the estate of ____, deceased, to pay to ____, an heir at law of said decedent, the sum of ____ dollars (\$____) upon the giving of a bond to said administrator⁵ in the sum of ____ dollars (\$____),⁶ conditioned according to law;

That said bond, as aforesaid, was subsequently given to the said administrator,⁷ in compliance with said order, and that, in compliance with said order, the said administrator⁸ paid to the said heir at law the sum of ____ dollars (\$____);

That the court, in making said order, placed an erroneous estimate upon the debts, costs, charges, and expenses of administration; that such debts, etc., are far in excess of the estimate made at the time of the making of said order;

and that the amount thereof, instead of being _____ dollars (\$_____), as estimated at the time said order was made, is more than _____ dollars (\$_____).⁹

Your petitioner therefore submits that it is necessary, for the settlement of the said estate, to require the said _____ to refund a portion of the money so paid to him as aforesaid; to wit, the sum of _____ dollars (\$_____).

Wherefore your petitioner prays that the said _____ be required to refund to the administrator¹⁰ of said estate, out of the sum so paid to him as aforesaid, a sum sufficient to liquidate his share of the indebtedness of said estate, to wit, said sum of _____ dollars (\$_____); and for such other or further order as may be meet. _____, Petitioner.

_____, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4, 5. Or, executor, according to the fact. 6. In such sum as may have been designated by the court. 7, 8. Or, executor. 9. Or state any other facts showing that it is necessary to refund a part of the money. 10. Or, executor.

§ 727. Form. Order that legatee, etc., refund money to pay debts.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

It being shown to this court that _____, the administrator² of the estate of _____, deceased, filed in this court on the _____ day of _____, 19____, his petition for an order requiring _____, an heir at law of said decedent, to refund to the said administrator³ a sufficient sum, out of money theretofore received by him out of said estate under and by virtue of the order of this court, to pay his proportion of the indebtedness of said estate; and that a citation was afterwards duly issued and served on the party bound, requiring him to appear and show cause why said order should not be made; and the matter now coming regularly on for hearing,⁴ the court proceeds to hear the allegations and proofs, and the court, after such hearing, being satisfied that no sufficient reason exists why said order should not be made, finds

that it is necessary, in order to cancel the indebtedness of said estate, that the said — should refund to said administrator ⁵ the sum of — dollars (\$—) out of the money heretofore received by him as aforesaid, —

It is therefore ordered, adjudged, and decreed, That the said — be, and he is hereby, required to pay to the said administrator, ⁶ out of said money so received as aforesaid, the said sum of — dollars (\$—) within — ⁷ days from the date of this order.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2, 3. Or, executor, etc., according to the fact. 4. Or, if the matter has been continued, say, "and the matter having been by the court regularly postponed to the present time." 5, 6. Or, executor, etc. 7. Time fixed by court.

PARTIAL DISTRIBUTION.

- | | |
|---------------------|-------------------|
| 1. Power of courts. | 5. Hearing. |
| 2. Petition. | 6. Order. |
| 3. Notice. | 7. Other matters. |
| 4. Bond. | 8. Appeal. |

1. Power of courts. Whether there be opposition or not, or what ever the opposition may be, the petitioner for partial distribution must show that the estate is but little indebted, that he is entitled to the share he asks, and what, when the expenses of administration are paid, his share will amount to. The only office of an opposition is to rebut this showing: Estate of Painter, 115 Cal. 625, 640; 47 Pac. Rep. 700. The power of the court to make an order of partial distribution before final settlement is expressly conferred by the statute: Estate of Crocker, 105 Cal. 368, 371; 38 Pac. Rep. 954. The requirement of the statute that the estate shall be but "little indebted" is to be construed relatively, and not absolutely, and merely refers to a condition of things in which the debts are small, when considered in connection with the value of the estate: Estate of Hale, 121 Cal. 125, 130; 53 Pac. Rep. 429. No express authority for decreeing partial distribution of an estate in the hands of a special administrator is found: Estate of Welch, 106 Cal. 427, 433; 39 Pac. Rep. 805. Where a will has been admitted to probate under compromise agreements, the order admitting it becomes the basis of administration, and controlling as to the devolution of the property. The court has power, on petition for a partial distribution of the estate, made by persons who are entitled to fixed shares according to such agreement, to authorize distribution according to the agreement. The court has power, on consent of all the

parties interested in a will contest, to enter a decree affirming a compromise thereof, and ascertaining the share to which the parties are respectively entitled: *In re Davis' Estate*, 27 Mont. 490; 71 Pac. Rep. 757, 759. The fact that writs are pending against an estate, in which plaintiffs are strangers, and the distributees and the administrator are parties, for the purpose of obtaining liens on the interest of the defendants in the estate, furnishes no reason why the court should refuse to order a distribution of the estate, where there is nothing in the record to show that any receiver has been appointed, or that the shares thus sought to be reached are impounded in the hands of the administrator: *In re Davis' Estate*, 27 Mont. 490; 71 Pac. Rep. 757, 760. In a proceeding for partial distribution, on petition of decedent's widow, the court has no power to distribute any of the property of the estate to a person who claims title thereto as grantee of the widow, where, under the statutes in force for partial distribution, no one other than an heir, devisee, or legatee, having an interest, as such, in the property for which distribution is asked, is authorized to petition for such distribution: *In re Foley's Estate*, 24 Nev. 197; 51 Pac. Rep. 834, 837. Nor has the court any power to decree a partial distribution upon the petition of the executor or administrator: *Estate of Letellier*, 74 Cal. 311, 312; 15 Pac. Rep. 847; *Alcorn v. Buschke*, 133 Cal. 655; 66 Pac. Rep. 15. The executors, while authorized to resist an application for partial distribution, have no interest in having the property go to one rather than another of the contending claimants of the estate: *Estate of Young*, 149 Cal. 173; 85 Pac. Rep. 145, 146. Such a question does not affect the administrator or executor in his representative capacity. It concerns only the rights of the heirs, devisees, legatees, etc. In such cases the administrator or executor cannot litigate the claims of one set of legatees against the others at the expense of the estate: *Estate of Murphy*, 145 Cal. 464, 467; 78 Pac. Rep. 960. An order of distribution to an incompetent person, who has not appeared by guardian, is erroneous, as there is no competent person asking for a distribution in his behalf: *In re Davis' Estate*, 27 Mont. 490; 71 Pac. Rep. 757, 760. No suit to determine distributees' shares in an estate is necessary, where the parties have agreed as to the share that each one shall receive: *In re Davis' Estate*, 27 Mont. 490; 71 Pac. Rep. 757, 760.

2. Petition. The statute does not attempt to prescribe the form or contents of a petition for partial distribution. It is clear that elaborate pleadings are not required or contemplated in the proceeding, and, so far as the executor is concerned, they are not necessary, as generally, he must have greater knowledge of the value and character of the property, the amount of money on hand, and the amount of the indebtedness, than any other person. Hence a statement of the ultimate facts concerning

the nature of the estate and the amount of the debts which, according to the code, the court must find to exist before making the order will afford sufficient information of the grounds on which the application will be made to enable the executor, at least, to make any proper opposition or defense. If it accomplishes this, it serves the purpose for which pleadings are required: *Estate of Murphy*, 145 Cal. 464, 466, 467; 78 Pac. Rep. 960. The court is authorized to order the payment of the legacies upon a petition which shows that the estate "is but little indebted," and that the payment can be made "without loss to the creditors of the estate": *Estate of Chesney*, 1 Cal. App. 30, 34; 81 Pac. Rep. 679. A petition for partial distribution is not defective because it describes the petitioners as "heirs at law." This, properly, is but a step in the ordinary course of administration; and the fact that petitioners are described in the petition as heirs at law, instead of devisees and legatees under the will, is entirely immaterial, the court having judicial notice of the will at every stage of the proceeding. Nor is it any objection to such a petition that it was filed by several claimants, instead of one: *Estate of Crocker*, 105 Cal. 368; 38 Pac. Rep. 954, 955. Even if an order of sale has been granted, the court has power to stay the execution of the order of sale, and to grant a petition for partial distribution: *State v. District Court*, 34 Mont. 345; 86 Pac. Rep. 268, 269. A partial distribution of personal property may properly be made under the provisions of the will; but a petition by a sole heir for distribution of his share of the entire estate is properly denied, pending an application for the sale of the real estate to raise funds necessary to pay charges and funeral expenses: *Estate of Koppikus*, 1 Cal. App. 88, 89; 81 Pac. Rep. 733. A question of contested heirship, or right to inherit, may be determined on a petition for partial distribution: *Estate of Jessup*, 81 Cal. 408, 415; 6 L. R. A. 594; 24 Pac. Rep. 976; 22 Pac. Rep. 742, 1028.

3. Notice. Where a motion has been made to vacate an order denying a petition for partial distribution, and an order has been made granting such petition, but the notice in each case is served only upon the executors, and no notice is given by posting as prescribed by the statute, the court acquires no jurisdiction to make either order, as legatees and creditors, for want of such notice, have been deprived of an opportunity to be heard: *Estate of Mitchell*, 126 Cal. 248, 252; 58 Pac. Rep. 549. Where the notice expressly required by statute has been given, the question as to whether further notice shall be given or not is a matter within the discretion of the court, and, in the absence of anything to show that such discretion has been abused, the appellate court will not interfere: *Estate of Jessup*, 81 Cal. 408, 436; 21 Pac. Rep. 976.

4. Bond. The only circumstances under which the giving of a bond, by an heir, for his proportion of indebtedness may be executed upon partial distribution, is where it appears that the time for presenting claims against the estate has expired, and that all claims that have been allowed have been paid, or are secured by mortgage upon real estate sufficient to pay them, and the court is satisfied that no injury can result to the estate: *Estate of Hale*, 121 Cal. 125, 131; 53 Pac. Rep. 429; *Estate of Mitchell*, 121 Cal. 391, 393; 53 Pac. Rep. 810. If the evidence shows that a large proportion of the demands are unsecured by mortgage or otherwise, and that such unsecured demands have not been paid, a court is not authorized to dispense with the giving of a bond: *Estate of Hale*, 121 Cal. 125, 131; 53 Pac. Rep. 429. But the court may order a partial distribution of the estate to devisees and legatees, without requiring them to give bonds, if it reserves from distribution sufficient other property to pay all contested claims, and the court finds that no injury can result to the estate by reason of such partial distribution: *Estate of Crocker*, 105 Cal. 368, 371; 38 Pac. Rep. 954. It is erroneous to dispense with the bond, upon a partial distribution to legatees, if it appears that unsecured claims allowed have not been paid: *Estate of Mitchell*, 121 Cal. 391, 395; 53 Pac. Rep. 810; but the fact that a claim has been presented by a legatee against the estate, and has been rejected by the executors, and that a suit thereon is pending, does not preclude the court from making an order for the payment of her legacy, where it is not claimed that there is any indebtedness against the estate other than this rejected claim, and the executors still have in their hands property belonging to the estate many times in value the amount of the rejected claim with which to pay the same, if it shall be adjudged valid: *Estate of Chesney*, 1 Cal. App. 30, 34; 81 Pac. Rep. 679.

5. Hearing. While it is true that the allowance to be made for commissions, attorneys' fees, and charges to close the administration cannot be definitely fixed until the final settlement of the executor, yet, in ascertaining whether a partial distribution shall be ordered, and for the purpose of fixing the amount thereof, it is necessary for the court to take these matters into consideration, and to determine them upon proper data furnished at the application for the hearing. Hence, when the application comes on for hearing, and the court finds that all the debts of the estate have been paid; that there is at least several thousand dollars remaining in the hands of the executor belonging to the estate, and that it has been there for several years; that no distribution of any part of the estate has ever been made to the widow, or to her son as her assignee; that fifteen hundred dollars could be allowed and paid to the son without injury to the estate; and that, after such payment, there would remain in

the hands of the executor more than enough money to pay for commissions, together with a reasonable attorney's fee and the charges of closing the estate,—there is no error in distributing the said sum of fifteen hundred dollars: *Estate of Straus*, 144 Cal. 553, 556; 77 Pac. Rep. 1122. But, in determining the amount of money in the hands of executors available for the payment of a legacy, the court is not required to take into consideration the amount of the collateral-inheritance tax. The tax is computed, not on the aggregate valuation of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate interests in which it is divided by the will, or by the statute laws of the state, and is a charge against each share or interest, according to its value, and against the person entitled thereto. Therefore if the court, in fixing the amount to be paid as a legacy, deducts therefrom the amount of the tax on such a legacy, it is to be assumed that, before paying or delivering to the other beneficiaries under the will any property given to them by the testatrix, the executors either deducted therefrom or collected from the said beneficiaries the amount of the tax on their respective gifts: *Estate of Chesney*, 1 Cal. App. 30, 33; 81 Pac. Rep. 679. The question as to what property is embraced in an agreement between the widow and the other heirs for a distribution of the estate, whether the separate property only, or both the separate and community property, is one foreign to the subject-matter of partial distribution, and is not properly before the court in such a proceeding: *In re Foley's Estate*, 24 Nev. 197; 51 Pac. Rep. 834, 837.

6. **Order.** No default can be taken upon the hearing of a petition for a partial distribution of the estate of a deceased person. A plenary showing must be made by the applicant at the hearing. If opposition is made, and the grounds of the opposition are stated in writing, that cannot limit the inquiry, nor can the court take the admission of contestants, unless it clearly appears that the admission is made by all parties in the proceeding: *Estate of Painter*, 115 Cal. 635, 639; 47 Pac. Rep. 700. An order for partial distribution may be made after the administrator or executor has presented his final account, but before the same has been allowed, upon the giving of a bond to indemnify the estate. If partial distribution could only be had after final accounts are allowed, there would be no use of the proceeding for partial distribution, and the benefits of the statute might be entirely lost. It was to avoid the hardship often incident to the long delays of the final accounting that, upon a sufficient showing, partial distribution might be had: *In re Phillips' Estate*, 18 Mont. 311; 45 Pac. Rep. 222, 224. If certain legatees petition for partial distribution, but other legatees and devisees do not appear at the hearing, or in any manner object to the order in favor of petitioners, and the executor, in his representative capacity, appeals on the

ground of the insufficiency of the petition respecting its statements of the condition and value of the estate and the amount of the debts, the order of distribution becomes final, in as far as it allowed the legacies: *Estate of Murphy*, 145 Cal. 464; 78 Pac. Rep. 960, 962. Where legatees apply for partial distribution, and the executor appears and contests the petition in his capacity as executor only, such appearance does not entitle him to claim rights, in such proceeding, which he possessed solely as devisee. As such devisee he must be considered as one who has suffered default: *Estate of Murphy*, 145 Cal. 464; 78 Pac. Rep. 960, 962. If the sum left in the hands of a widow, as executrix of her deceased husband's estate, after payment to legatees, is sufficient to cover expenses of administration, the amount devised to her as widow, and a reasonable family allowance, she is not prejudiced by an order of partial distribution: *In re Phillips' Estate*, 18 Mont. 311; 45 Pac. Rep. 222, 224. A decree of partial distribution cannot be attacked for fraud, where such decree was in strict accord with the terms of the will, and necessarily followed the decree admitting the will to probate, if the probate of the will cannot be successfully attacked in some way: *Tracy v. Muir*, 151 Cal. 363, 367; 90 Pac. Rep. 832, 833. The better practice is to specify, in the order, the sum to be paid by the executors, and the amount of the collateral-inheritance tax to be deducted therefrom: *Estate of Mitchell*, 121 Cal. 391; 53 Pac. Rep. 810, 811. Where it is admitted at the hearing of a petition for partial distribution that due notice of the application was given to the executors and all persons interested, this is sufficient to require all those interested, who desire to combat the proceeding, to put in an appearance, and if a motion to set aside an order denying such petition is made, it is sufficient to give notice to the executors, who have appeared through their attorneys: *Estate of Mitchell*, 121 Cal. 391; 53 Pac. Rep. 810, 811. A decree of partial distribution containing a clause imposing a condition is erroneous: *Estate of Garrity*, 108 Cal. 463, 474; 38 Pac. Rep. 628; 41 Pac. Rep. 485.

7. Other matters. If a complaint to quiet title, filed by heirs at law, and as grantees of the remaining heir at law, sets up a void decree of partial distribution, made upon petition of the administrator, as being one of the sources of defendant's claim of title to the property in question, and alleges that the plaintiffs were not cognizant of the proceedings for partial distribution, and never consented, agreed to, or approved of the object thereof, and there is nothing whatever to indicate that the plaintiffs actually took any land under said decree, or derived any advantage or benefit thereunder, the question as to whether they are estopped, by taking thereunder, from questioning the validity of such decree is not presented upon a demurrer to the complaint: *Alcorn v. Brandeman*, 145 Cal. 62, 65; 78

Pac. Rep. 343. There is not an "omission to provide" for children in a will where the children are mentioned by the testator; and where the testator has parted with land devised to the issue of a deceased child, and the grand-children petition for a partial distribution of other estate, claiming as pretermitted heirs, parol evidence is not admissible to show that the land devised to them was not owned by the testator at the time of making the will, or at the time of his death, and that the grand-children had never received any part of the estate of the testator by way of advancement: *Estate of Callaghan*, 119 Cal. 571, 573; 39 L. R. A. 689; 51 Pac. Rep. 860. Whether the widow is entitled to one half the community property, and to take under the will also, may be determined upon an application for partial distribution; although, if the judge sees fit, he may defer the distribution and direct suit to be brought to determine the extent of her interest: *Estate of Painter*, 115 Cal. 635, 640; 47 Pac. Rep. 700. A decree of partial distribution of the estate of a decedent, adjudging that the petitioner has succeeded to all the right, title, and interest of the widow, the sole devisee of deceased, does not confer upon him any greater title than she possesses in law, and makes him only a tenant in common with children of the decedent omitted from the will, though the whole land was devised to the widow. Under such a decree he succeeds only to all of the interests of the devisee in the land described, and, any further than that, the decree is a nullity, so far as the interests of the omitted children are concerned: *Estate of Grider*, 91 Cal. 571, 573, 577; 22 Pac. Rep. 908. If the successor in interest of one of the distributees enters into possession of land under a decree of partial distribution, claiming title to the whole of the land, he cannot, by limitation or adverse possession, as against those who are legally entitled to claim an interest in the land as tenants in common, acquire title by limitation or adverse possession, so long as the administration of the estate remains unclosed, and although he pays taxes on the property: *Estate of Grider*, 81 Cal. 571, 578; 22 Pac. Rep. 908. The executrix of an estate cannot urge that legatees petitioning for a partial distribution have forfeited their rights to their legacies because of an alleged violation of a provision in the will, that, if any one named therein should contest the same, he or she should take nothing under it, where that question concerns only the rights of the residuary devisees. This is a question in which the executrix, as such, has no interest. She cannot litigate the claims of one set of legatees against the others at the expense of the estate: *Estate of Murphy*, 145 Cal. 464, 467; 78 Pac. Rep. 960. When any person appears in a proceeding for partial distribution of the estate of a decedent, claiming to be interested in the estate as the grantee of an heir, devisee, or legatee, and claiming the property sought to be distributed as his own, and objects to such distribution being made to his grantor on these grounds, the distribution should be denied or

suspended until the rights of the contestant may be determined on final distribution, or in some other appropriate proceeding: *Griffin v. Foley*, 24 Nev. 291; 53 Pac. Rep. 8. There may be circumstances under which a person would be estopped from maintaining a suit for partial distribution of an estate, though he is entitled to it, where its effect would be to injure other heirs: *Estate of Glenn (Cal.)*, 94 Pac. Rep. 230, 232.

8. Appeal. An appeal may be taken from an order of partial distribution of an estate of a deceased person, upon the petition of legatees; and the executors may take such appeal: *Estate of Mitchell*, 121 Cal. 391, 393; 53 Pac. Rep. 810; *Estate of Kelly*, 63 Cal. 106, 107. An executrix may appeal from such an order, where she presents for review an issue of law as to the sufficiency of the petition to show that there were sufficient assets to pay the legacies without loss to the creditors. It is a sound proposition that administrators, general or special, like receivers and other trustees, or custodians of funds for designated purposes, are not ordinarily affected by orders in reference to their disposition, and therefore will not be heard on appeal from such orders. But, wherever an order or decree involves a construction of the proper exercise of the duties of the officer, whenever it presents a question as to the right or power of the trustee to comply with it, whenever obedience to it might subject him to liability, the rule does not operate. Even where the order is one merely for the payment of funds, if any of these questions arise under it, and personal liability may attach, the right of the officer to appeal is recognized and upheld: *Estate of Murphy*, 145 Cal. 464, 467; 78 Pac. Rep. 960. Persons who claim as devisees under decedent's will, and who appear in that capacity to contest a petition for partial distribution, are "adverse parties," within the meaning of the statute that declares that a draft of the bill of exceptions, or a copy thereof, must, within ten days after notice of the entry of judgment, be served upon the adverse party. So if the devisees move to strike such petition from the files, they are entitled to service of a draft of the bill of exceptions, as they are the only parties to the record having a substantial interest in opposing the distribution sought; and the effect of the failure so to serve them will be that the appellate court cannot, for any purpose, consider the bill of exceptions on appeal: *Estate of Young*, 149 Cal. 173; 85 Pac. Rep. 145, 146. If an order for partial distribution, vacating a previous order denying a petition therefor, is reversed on appeal from the entire order, the order denying the petition is left in full force and effect: *Estate of Mitchell*, 126 Cal. 248, 251; 58 Pac. Rep. 549. A court has no authority to make an order granting a petition for partial distribution, without having vacated a prior order denying it, though such prior order was made without prejudice to the making of another application; such

reservation not being necessary to preserve the right to file a new petition: *Estate of Mitchell*, 126 Cal. 248, 251; 58 Pac. Rep. 549. In determining whether a partial distribution can be safely made, the probate judge should proceed with great caution, and very much must be left to his discretion. If he decides that the condition of the estate is such that distribution cannot be safely made, his conclusion cannot well be reversed: *Estate of Painter*, 115 Cal. 635, 640; 47 Pac. Rep. 700. A decree of partial distribution will not be disturbed upon appeal, where it appears that the estate was but little indebted, and that the property could be distributed without loss to the creditors of the estate, especially where it appears that the appellants are not such creditors: *Estate of Dutard*, 147 Cal. 253, 256, 258; 81 Pac. Rep. 519. If an executor's appeal from an order directing a partial distribution is frivolous, the court may make him respond in damages for the delay which his appeal has occasioned: *Estate of Straus*, 144 Cal. 553; 77 Pac. Rep. 1122, 1124.

CHAPTER II.

PROCEEDINGS TO DETERMINE HEIRSHIP. DISTRIBUTION
ON FINAL SETTLEMENT.

- § 728. Proceedings, in the nature of an action, to determine heirship.
Petition. Service of notice and decree establishing proof
of. Order adjudging default. Complaint, and plea thereto.
New trial. Parties. Evidence, oral or by deposition. Costs.
Conclusiveness of determination in distribution of estate.
- § 729. Form. Petition for ascertainment of rights as heirs.
- § 730. Form. Notice upon filing of petition to ascertain rights as heirs.
- § 731. Form. Order upon filing of petition to ascertain rights as heirs.
- § 732. Form. Order establishing service of notice to determine heir-
ship.
- § 733. Form. Attorney's authority to appear in matters of heirship.
- § 734. Form. Complaint on claim of heirship.
- § 735. Form. Answer to complaint on claim of heirship.
- § 736. Form. Entry of default on petition to ascertain heirship.
- § 737. Form. Decree establishing heirship.
- § 738. Distribution of estate. How made, and to whom.
- § 739. Decree of distribution. Contents, and conclusiveness of.
- § 740. Distribution where decedent was a non-resident of the state.
- § 741. Notice must precede decree for distribution.
- § 742. Form. Petition for distribution of estate.
- § 743. Form. Memorandum, by clerk, fixing time for hearing petition
for final distribution.
- § 744. Form. Notice of hearing of petition for final distribution.
- § 745. Form. Affidavit of posting notice of hearing of petition for
final distribution.
- § 746. Form. Decree of distribution.
- § 747. Form. Decree of distribution. (Another form.)
- § 748. Form. Decree of distribution to foreign executor. (To be
used for personal property only.)
- § 749. Distribution not to be made until taxes are paid.
- § 750. Continuation of administration.

ESTABLISHMENT OF HEIRSHIP, RIGHTS AND LIABILITIES OF HEIRS,
AND DISTRIBUTION.

I. Proceedings to Determine Heirship.

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| 1. Jurisdiction of courts. | (2) Parties. Pleadings. |
| (1) In general. | (3) Trial. |
| (2) Limitations of jurisdiction. | (4) Decree. |
| 2. Procedure. | (5) Costs. |
| (1) In general. | (6) Appeal. |

II. Rights and Liabilities of Heirs.

1. Appointment of attorney for heirs.
2. Vesting of property in heirs. Burdens.
 - (1) In general.
 - (2) Judgment liens against heirs.
 - (3) Community property.
3. Actions by heirs.
 - (1) In general.
 - (2) In ejectment.
 - (3) To enforce trust.
 - (4) In partition.
 - (5) On promissory notes.
 - (6) To quiet title.
 - (7) Counterclaim will not be considered when.
 - (8) Judgment for heirs as an estoppel.
4. Actions by heirs against administrators.
 - (1) In general.
 - (2) Against administrators individually.
5. Limitation of actions by heirs. Laches.
6. Actions between heirs and devisees.
7. Rights of heirs to attack sale of property.
 - (1) For want of jurisdiction.
 - (2) For fraud.
8. Estoppel of heirs.
9. Liability of heirs.
 - (1) In general.
 - (2) Limitation of liability.
10. No allowance to heirs, of costs and expenses, from estate.
11. Purchaser from heirs.
 - (1) In general.
 - (2) Purchaser does not acquire what.
12. Mortgages by heirs and devisees, pending administration.
13. Contract relinquishing right as heir.
14. Right of heirs to contest accounts. Jurisdiction to determine conflicting interests.

III. Distribution.

1. In general.
2. Petition for distribution.
3. Notice.
4. Limitations on distribution.
 - (1) In general.
 - (2) Payment of taxes. Collateral inheritance tax.
5. Delay of distribution.
6. Jurisdiction.
7. Distribution with final accounting and settlement.
 - (1) In general.
 - (2) Waiver of settlement of account.
 - (3) Settlement of accounts. Notice.
 - (4) Distribution subsequent to final settlement. Power of court.
8. What matters may be adjusted.
 - (1) In general.
 - (2) Question of heirship.
9. Consideration of will.
10. Objections to distribution.
11. Kinds of property.
12. Distributees.
 - (1) In general.
 - (2) Assignees. Shares "conveyed." Grantee.
- (3) Retention of distributee's share for debt.
- (4) Right of action to recover property.
13. Distribution to non-residents.
14. Decree.
 - (1) In general.
 - (2) Power of court.
 - (3) Not an escheat.
 - (4) Notice.
 - (5) Annuling will after distribution.
 - (6) Error. Irregularity. Nullity.
 - (7) Effect of decree.
 - (8) Conclusiveness of decree as to persons.
 - (9) Conclusiveness of decree as to subject-matter.
 - (10) Decree is not conclusive as to whom, and what.
 - (11) Enforcement of decree, contempt, execution.
 - (12) Collateral attack.
 - (13) Vacating decree. Fraud. Equity.
 - (14) Vacating premature decree.
 - (15) Loss of jurisdiction.
15. Payment. Duty of executors.
16. Distribution without decree.

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| 17. Rights of creditors. Set-off. Garnishment. | (8) Who cannot appeal. |
| 18. Actions by transferees of choses in action. | (4) Distribution pending appeal. |
| 19. Appeal. | (5) Review. Certiorari. Writ of review. |
| (1) In general. | (6) Reversal and its effect. |
| (2) Stay of proceedings. | (7) Non-appealable orders. |
| | (8) Dismissal. |

§ 728. Proceedings, in the nature of an action, to determine heirship. Petition. Service of notice and decree establishing proof of. Order adjudging default. Complaint, and plea thereto. New trial. Parties. Evidence, oral or by deposition. Costs. Conclusiveness of determination in distribution of estate. In all estates now being administered, or that may hereafter be administered, any person claiming to be heir to the deceased, or entitled to distribution in whole or in any part of such estate, may, at any time after the expiration of one year from the issuing of letters testamentary or of administration upon such estate, file a petition in the matter of such estate, praying the court to ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made.

[Court to make order directing notice.] Upon the filing of such petition, the court shall make an order directing service of notice to all persons interested in said estate to appear and show cause, on a day to be therein named, not less than sixty days nor over four months from the date of the making of such order, in which notice shall be set forth the name of the deceased, the name of the executor or administrator of said estate, the names of all persons who may have appeared claiming any interest in said estate in the course of the administration of the same, up to the time of the making of said order, and such other persons as the court may direct, and also a

Description of the real estate whereof said deceased died seised or possessed, so far as known, described with certainty to a common intent, and requiring all said persons and all persons named or not named having or claiming any interest in the estate of said deceased, at the time and place in said order specified, to appear and exhibit, as hereinafter pro-

vided, their respective claims of heirship, ownership, or interest in said estate, to said court, which notice shall be served in the same manner as a summons in a civil action, upon proof of which service, by affidavit or otherwise, to the satisfaction of the court, the court shall thereupon acquire jurisdiction to ascertain and determine the heirship, ownership and interest of all parties in and to the property of said deceased, and such determination shall be final and conclusive in the administration of said estate, and the title and ownership of said property.

[Decree of service. Appearance.] The court shall enter an order or decree establishing proof of the service of such notice. All persons appearing within the time limited as aforesaid, shall file their written appearance in person or through their authorized attorney, such attorney filing at the same time written evidence of his authority to so appear, entry of which appearance shall be made in the minutes of the court and in the register of proceedings of said estate. And the court shall, after the expiration of the time limited for appearing as aforesaid, enter an order adjudging the default of all persons for not appearing as aforesaid, who shall not have appeared as aforesaid.

[Complaint setting forth heirship.] At any time within twenty days after the date of the order or decree of the court establishing proof of the service of such notice, any of such persons so appearing may file his complaint in the matter of the estate, setting forth the facts constituting his claim of heirship, ownership, or interest in said estate, with such reasonable particularity as the court may require, and serve a copy of the same upon each of the parties or attorneys who shall have entered their written appearance as aforesaid, if such parties or such attorneys reside within the county; and in case any of them do not reside within the county, then service of such copy of said complaint shall be made upon the clerk of said court for them, and the clerk shall forthwith mail the same to the address of such party or attorney as may have left with said clerk his post-office address.

[Time to plead to complaint of heirship.] Such parties are allowed twenty days after the service of the complaint, as aforesaid, within which to plead thereto, and thereafter such proceedings shall be had upon such complaint as in this code provided in case of an ordinary civil action; and the issues of law and of fact arising in the proceeding shall be disposed of in like manner as issues of law and fact are herein provided to be disposed of in civil actions, with a like right to a motion for a new trial and appeal to the supreme court; and the provisions in this code contained regulating the mode of procedure for the trial of civil actions, the motion for a new trial of civil actions, statements on motion for a new trial, bills of exception, and statements on appeal, as also in regard to undertakings on appeal, and the mode of taking and perfecting appeals, and the time within which such appeals shall be taken, shall be applicable thereto; provided, however, that all

Appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of.

[Plaintiff, party filing complaint.] The party filing the petition as aforesaid, if he file a complaint, and if not, the party first filing such complaint, shall, in all subsequent proceedings, be treated as the plaintiff therein, and all other parties so appearing shall be treated as the defendants in said proceedings, and all such defendants shall set forth in their respective answers the facts constituting their claim of heirship, ownership, or interest in said estate, with such particularity as the court may require, and serve a copy thereof on the plaintiff. Evidence in support of all issues may be taken orally or by deposition, in the same manner as provided in civil actions.

Notice of the taking of such depositions shall be served only upon the parties, or the attorneys of the parties, so appearing in said proceeding. The court shall enter a default of all persons failing to appear, or plead, or prosecute, or defend their rights as aforesaid; and upon the trial of the issues arising upon the pleadings in such proceeding, the court shall determine the heirship to said deceased, the

That various persons claim an interest in the estate of said deceased; and that their rights have not been ascertained or determined by the judgment, order, or decree of any court of competent jurisdiction.

Wherefore your petitioner prays that an order be made and entered herein, as provided by law, requiring all persons interested in said estate to appear and exhibit, in the manner provided by law, their respective claims of heirship, ownership, or interest in said estate, to said court, on or before a day to be specified in said order;³ and that this court ascertain and declare the rights of all persons to said estate and all interests therein, and to whom distribution thereof should be made.

_____, Petitioner.

_____, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, she. 5. Or other relative. 6. Or, is a devisee or legatee under the last will and testament of _____, deceased. 7. Or, letters testamentary. 8. Not less than sixty days nor over four months from the date of the making of such order, or otherwise as prescribed by statute.

§ 730. Form. Notice upon filing of petition to ascertain rights as heirs.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To _____, the Administrator² of the Estate of _____, Deceased, and to _____ and _____,³ and _____ and _____,⁴ _____ and _____,⁵ and _____ and _____.⁶

You and each of you are hereby notified:

That on the _____ day of _____, 19____, _____, one of the heirs at law of _____, deceased, filed his petition in this court praying that the rights of all persons interested in the estate of said _____, deceased, be ascertained and declared by this court, and that it be determined to whom distribution should be made;

That, so far as known, the following is a description of the real estate whereof said deceased died seised or possessed, to wit: _____;⁷

That the said — and —⁸ are the only persons who appeared and claimed any interest in said estate, in the course of the administration of the same, up to the time of the making of said order;

That you, and all other persons not named, who have or claim an interest in said estate, are cited to appear before this court, at the court-room thereof,⁹ in the said county¹⁰ of —, state of —, on the — day of —, 19—, at the hour of — o'clock in the forenoon¹¹ of said day, and exhibit, in the manner provided by law, your respective claims of heirship, ownership, or interest in said estate, and show cause why such petition should not be granted.

[Seal]

—, Clerk of the — Court.

By —, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, executor of the last will and testament of —, according to the fact. 3. Heirs at law of said deceased. 4. Devisees and legatees named in will of said deceased. 5. Names of persons who have appeared and claimed an interest in said estate. 6. Such other persons as the court may direct to be notified. 7. Insert description. 8. Names of persons who have appeared, claiming an interest. 9. Give location of court-room. 10. Or, city and county. 11. Or, afternoon.

§ 731. Form. Order upon filing of petition to ascertain rights as heirs.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

It appearing to this court that —, one of the heirs at law of —, deceased, has filed herein his petition praying that the rights of all persons interested in the estate of said —, deceased, be ascertained and declared by this court, and that it be determined to whom distribution thereof should be made, —

It is ordered, That the clerk of this court cause notice to be served upon all persons, named or not named, who have or claim any interest in said estate, to appear before this court, at the court-room thereof, at —,² in the said county³ of —, state of —, on the — day of —, 19—, at the hour of — o'clock in the forenoon⁴ of said

day, and exhibit, in the manner provided by law, their respective claims of heirship, ownership, or interest in said estate, and show cause why said petition should not be granted.

Dated —, 19—, —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Give location of courtroom. 3. Or, city and county. 4. Or, afternoon, as the case may be.

§ 732. Form. Order establishing service of notice to determine heirship.

[Title of court.]

[Title of estate.] { No. —.¹ Dept. No. —
[Title of form.]

Upon motion of —, the petitioner herein, by —, his attorney, and due proof of service having been made, it is adjudged and decreed by the court that due service of the notice and order to show cause, issued upon the filing of the petition of — for the ascertainment of the rights of the persons interested in said estate as to their heirship has been made as required by law and by the order of the court, upon the persons named in the said order.

Dated —, 19—. —, Judge of the — Court.

Explanatory note. 1. Give file number.

§ 733. Form. Attorney's authority to appear in matters of heirship.

[Title of court.]

[Title of estate.] { No. —.¹ Dept. No. —
[Title of form.]

Authority is hereby given to —, an attorney at law, of the county² of —, state of —, to appear for and to represent me in all matters of the above-entitled estate in which I am interested, and he is hereby authorized and empowered to do all things necessary to protect my interests in said estate, especially in the matter of determining my rights therein, and of the making of distribution thereof.

Acknowledgment.

State of _____,
 County ² of _____, } ss.

On this _____ day of _____, 19____, before me, _____,⁴ personally appeared _____,⁵ known to me to be the person whose name is subscribed to the foregoing instrument, and who acknowledged to me that he executed the same for the uses and purposes therein mentioned.

_____, Notary Public, etc.⁶

Explanatory notes. 1. Give file number. 2, 3. Or, city and county. 4. Name and official character of officer. 5. Name of person. 6. Or other officer taking the oath.

§ 734. Form. Complaint on claim of heirship.

[Title of court.]

[Title of matter.] ¹

{ No. _____² Dept. No. _____
 [Title of form.]

The plaintiff complains and alleges:

1. That he has entered his written appearance in the above-entitled matter;

2. That _____³ days have not elapsed since the date of the order or decree of this court, in the above-entitled matter, establishing proof of service of notice as required by law;

3. That he is _____⁴ of said decedent, and one of his heirs at law;

4. That the other heirs at law of said _____, deceased, are _____;⁵

5. That said estate consists of both community property and separate property;

6. That the community property of said estate is particularly described as follows, to wit: _____;⁶

7. That the separate property of the said deceased is particularly described as follows, to wit: _____;⁷

8. That plaintiff is entitled to _____⁸ of said community property, and is entitled to _____⁹ of said separate property.

Wherefore plaintiff prays judgment that he be so entitled to share in said property and estate.

_____, Attorney for Plaintiff.

Explanatory notes. 1. As, In the Matter of Ascertaining and Declaring the Rights of the Heirs, and of All Other Persons Who Have or Claim any Interest in the Estate of —, Deceased, and of Determining to Whom Distribution thereof should be Made. 2. Give file number. 3. Twenty days, or other time prescribed by statute. 4. State relationship. 5. Give names, as of widow and children. 6, 7. Give description. 8, 9. State fractional part of estate to which claim is made.

§ 735. Form. Answer to complaint on claim of heirship.

[Title of court.]

[Title of estate.]¹ { No. —² Dept. No. —
[Title of form.]

The defendant, answering the complaint herein, admits, alleges, and denies³ as follows:

1. Admits the facts alleged in the second, fifth, sixth, and seventh paragraphs of said complaint.

2. Alleges that she has entered her written appearance in the above-entitled action.

3. Alleges that she is the widow⁴ of said decedent, and one of his heirs at law; and that the other heirs at law of said —, deceased, are: —.⁵

4. Alleges that she is entitled to —⁶ of said community property, and is entitled to —⁷ of said separate property.

Wherefore defendant prays that she be so entitled to share in said property and estate.

—, Attorney for Defendant.

Explanatory notes. 1. As in the complaint. 2. Give file number. 3. Denials, when necessary, should follow the statement of defendant's claims. 4. Or state other relationship. 5. Give names. 6, 7. State fractional part of estate to which claim is made.

§ 736. Form. Entry of default on petition to ascertain heirship.

[Title of court.]

[Title of estate.] { No. —¹ Dept. No. —
[Title of form.]

The following-named persons, to wit, —,² who are alleged to have or claim some right or interest in the estate

of —, deceased, having failed to appear in the matter of the petition of — to have the rights and interests of all persons in said estate declared, and said persons having each been duly served with notice of said petition as required by law and by the order of the court, and the time limited for such appearance having expired, —

It is ordered and adjudged by the court, That said persons so failing to appear as aforesaid, to wit, — and —, etc., are in default in said proceedings, and that the same be heard and determined in their absence.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Give their names.

§ 737. Form. Decree establishing heirship.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
{ [Title of form.]

Comes now —, the petitioner herein, by —, his attorney, and also comes —, complainant herein, by —, his attorney,² and come not — and —³ but herein make default, and each of them having been duly served with process herein, and each of them having failed to answer or to plead to the complaint of — filed herein, the said — and — are each adjudged to be in default accordingly, and the issues being joined, the court proceeds to the trial thereof, and, after hearing the evidence and arguments of counsel, the court makes and renders judgment as follows, to wit:

It is ordered, adjudged, and decreed by the court, That — died testate⁴ on the — day of —, 19—, leaving surviving as his only heirs at law the persons whose names and relationship to said deceased are as follows, to wit, —;⁵ that said deceased left a will, which has been duly admitted to probate herein, and that by the terms of said will the whole of the said estate is devised and bequeathed as follows, to wit: a specific money legacy of — dollars (\$—) is bequeathed to —; the following personal property is bequeathed to —, to wit: —;⁶ the follow-

ing described real estate is devised to —, to wit: —; to be held, etc.;⁸ and all the residue of said estate is disposed of as follows: —;⁹ and that upon the distribution of said estate the said devisees and legatees are entitled to the respective portions thereof as above set forth, and that in case the estate is not sufficient to satisfy all the said bequests and devises, the order of priority shall be as follows: —.¹⁰

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Insert other appearances in the same way. 3. Give the names of persons not appearing. 4. Or, intestate, as the case may be. 5. Insert names of heirs and relationship. If the deceased died intestate, proceed thus: "and that thereupon the estate of said deceased descended to his said heirs at law, and is now vested in them, subject to administration, in the following proportions, to wit: The said — is the owner of an undivided — [state fractional part] thereof; the said — is the owner, etc.; and each of said persons is entitled to distribution of said estate according to their respective rights and interests herein set forth." 6. Describe it. 7. Insert description. 8. Give the conditions or limitations imposed, if any. 9. State how. 10. State order of priority.

§ 738. Distribution of estate. How made, and to whom.

Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee, or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto; and if the decedent has left a surviving child, or the issue of a deceased child, and any of them, before the close of the administration, have died while under age and not having been married, no administration on such deceased child's estate is necessary, but all the estate which such deceased child was entitled to by inheritance must, without administration, be distributed as provided in the Civil Code. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final account, must be reported and filed at the time of making such distribution; and a settlement thereof, together with an esti-

mate of the expenses of closing the estate, must be made by the court, and included in the order or decree, or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of the settlement of accounts. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 505), § 1665.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1896.
- Colorado.** 3 Mills's Ann. Stats., sec. 4801.
- Idaho.** Code Civ. Proc. 1901, sec. 4275.
- Montana.** Code Civ. Proc., sec. 2843.
- Nevada.** Comp. Laws, sec. 3001.
- New Mexico.** Comp. Laws 1897, sec. 2028.
- North Dakota.** Rev. Codes 1905, § 8208.
- Oklahoma.** Rev. Stats. 1903, sec. 1755.
- South Dakota.** Probate Code 1904, § 307.
- Utah.** Rev. Stats. 1898, sec. 3953.
- Washington.** Pierce's Code, § 2679.
- Wyoming.** Rev. Stats. 1899, sec. 4830.

§ 739. **Decree of distribution. Contents, and conclusiveness of.** In the order or decree, the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legatees, or devisees, subject only to be reversed, set aside, or modified on appeal. **Kerr's Cyc. Code Civ. Proc.**, § 1666.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1897.
- Idaho.*** Code Civ. Proc. 1901, sec. 4276.
- Montana.*** Code Civ. Proc., sec. 2844.
- Nevada.** Comp. Laws, sec. 3002.
- North Dakota.** Rev. Codes 1905, § 8211.
- Oklahoma.*** Rev. Stats. 1903, sec. 1756.
- South Dakota.*** Probate Code 1904, § 308.
- Utah.** Rev. Stats. 1898, sec. 3954.
- Washington.** Pierce's Code, § 2680.
- Wyoming.** Rev. Stats. 1899, sec. 4831.

§ 740. Distribution where decedent was a non-resident of the state. Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state, or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate, and a like delivery of the proceeds. The delivery, in accordance with the order of the court, is a full discharge of the executor or administrator with the will annexed, in this state, in relation to all property embraced in such order, which, unless reversed on appeal, binds and concludes all parties in interest. Sales of real estate, ordered by virtue of this section, must be made in the same manner as other sales of real estate of decedents by order of the court. **Kerr's Cyc. Code Civ. Proc., § 1667.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1898.

Idaho.* Code Civ. Proc. 1901, sec. 4277.

Kansas. Gen. Stats. 1905, § 3049.

Montana.* Code Civ. Proc., sec. 2845.

North Dakota. Rev. Codes 1905, § 8223.

Oklahoma.* Rev. Stats. 1903, sec. 1757.

South Dakota.* Probate Code 1904, § 309.

Utah.* Rev. Stats. 1898, sec. 3968.

§ 741. Notice must precede decree for distribution. The order or decree may be made on the petition of the executor administrator, or of any person interested in the estate. When such petition is filed the clerk of the court must set the petition for hearing by the court, and give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the time appointed for the

hearing of the petition. If, upon the hearing of the petition, the court, or a judge thereof, deems the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper. At the time fixed for the hearing, or to which the hearing may be postponed, any person interested in the estate may appear and contest the petition by filing written objections thereto. If the partition is applied for, as provided in this chapter, the decree of distribution does not divest the court of jurisdiction to order partition, unless the estate is finally closed. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 505), § 1668.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1899.

Idaho. Code Civ. Proc. 1901, sec. 4278.

Montana. Code Civ. Proc., sec. 2846.

New Mexico. Comp. Laws 1897, sec. 2029.

Oklahoma. Rev. Stats. 1903, sec. 1758.

South Dakota. Probate Code 1904, § 310.

Washington. Pierce's Code, § 2681.

§ 742. Form. Petition for distribution of estate.

[Title of court.]

[Title of estate.] { No. ____.¹ Dept. No. ____.
[Title of form.] }

To the Honorable the ____² Court of the County³ of ____, State of ____.

The petition of ____, administrator⁴ of the estate of ____, deceased, respectfully shows:

That your petitioner was appointed such administrator⁵ by order of this court on the ____ day of ____, 19__, and on the ____ day of ____, 19__, he duly qualified as such administrator,⁶ and thereupon entered upon the administration of the estate of said deceased, and has ever since continued to administer said estate;

That on the ____ day of ____, 19__, your petitioner duly made and returned to this court a true inventory and appraisement of all the estate of said deceased which has come to his possession or knowledge;

That on the ____ day of ____, 19__, your petitioner duly published notice to creditors to present their claims against the said deceased in the manner and within the period limited by law;

That more than ____ has elapsed since the appointment of your petitioner as such administrator,⁷ and more than ____ months have expired since the first publication of said notice to creditors;

That on the ____ day of ____, 19__, your petitioner filed his accounts as such administrator,⁸ which said accounts, after due hearing and examination, were finally settled;

That all the debts of said deceased and of said estate, and all the expenses of the administration thereof incurred, and all taxes that have attached to or accrued against the said estate, have been paid and discharged, and that said estate is now in a condition to be closed;

That the ____⁹ said estate is ____¹⁰ property;

That the said deceased died intestate,¹¹ in the state of ____, county¹² of ____, on the ____ day of ____, 19__, leaving surviving him the following named heirs,¹³ who are entitled to distribution of the entire residue of said estate.

Wherefore your petitioner prays that the administration of said estate may be brought to a close; that he may be discharged from his trust as such administrator;¹⁴ that, after due notice is given and proceedings had, the estate remaining in the hands of your petitioner as aforesaid may be distributed to the said parties entitled thereto as aforesaid, to wit: ____; and that such other or further order may be made as is meet in the premises.

Dated ____, 19__.

____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4-8. Or, executor. 9. Whole of, or part thereof, designating it. 10. Community or separate property, according to the fact. 11. Or, testate. 12. Or, city and county. 13. Give names of heirs. In case of will, after giving names of heirs, and before "who are entitled," etc., insert: "that by will which was duly admitted to probate herein on the ____ day of ____, 19__, said decedent devised and bequeathed his whole estate, in the proportions and manner in said will specified, to the following named devisees and legatees: ____" 14. Or, executor.

§ 743. Form. Memorandum, by clerk, fixing time for hearing petition for final distribution.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

____, the administrator² of the estate³ of _____, deceased, having this day filed a petition praying for a decree of distribution of the residue of said estate to the persons entitled thereto, —

Now, I, _____, clerk of said _____ court, do hereby fix and appoint _____,⁴ the _____ day of _____, 19____, at _____ o'clock, a. m., and the court-room of said court, at the court-house in the county of _____, as the time and place for the hearing upon said petition.

Dated _____, 19____. _____, Clerk of the _____ Court.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, executor, or heir, etc. 3. Or, last will. 4. Give day of week.

§ 744. Form. Notice of hearing of petition for final distribution.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Notice is hereby given: That _____, the administrator² of the estate of _____, deceased, has presented to and filed in said court his petition for distribution to the parties entitled thereto, of all of the residue of said estate, and that _____,³ the _____ day of _____, 19____, at _____ o'clock in the forenoon⁴ of said day, at the court-room of said court,⁵ in said county,⁶ have been fixed and appointed by the court and clerk thereof as the time and place for the hearing of said petition, when and where any person interested in said estate may appear and file his exceptions, in writing, to the said petition and contest the same.

Notice is further given: That⁷ said estate is ready for distribution, and on the granting of said petition distribution of said estate will be immediately had.

Dated at _____ this _____ day of _____, 19____.

_____, Clerk of the _____ Court.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, executor, or heir, etc. 3. Day of week. 4. Or, afternoon. 5. Designate location of court-room. 6. Or, city and county. 7. If the application is made by any one except the administrator or executor, insert the name and capacity of such representative.

§ 745. Form. Affidavit of posting notice of hearing of petition for final distribution.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County² of _____, } ss.

_____, deputy county clerk of said county,³ being duly sworn, says: That on the _____ day of _____, 19____, he posted correct and true copies of the within notice in three of the most public places in said county,⁴ to wit, one of said copies at the place at which the court is held,⁵ one at _____,⁶ and one at _____,⁷ in said county.⁸

Subscribed and sworn to before me this _____ day of _____, 19____. _____, County Clerk.⁹

Explanatory notes. 1. Give file number. 2-4. Or, City and County. 5. Designate it. 6, 7. As, at the city hall, sheriff's office, land-office, or the United States post-office, designating its location. 8. Or, city and county. 9. Or other official designation.

§ 746. Form. Decree of distribution.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes _____, the administrator² of said estate, by _____, his attorney, and proves to the satisfaction of the court that his petition for distribution herein was filed on the _____ day of _____, 19____; that on the same day the clerk of this court appointed the _____ day of _____, 19____, for the hearing thereof; and that due and legal notice of the time and place of said hearing has been given as required by law and by the order of the court;³ and said petition being now presented to the court, and no person appearing to contest or object to the same,⁴ the court, after hearing the

evidence, being satisfied that all taxes upon the property of the estate (and any inheritance tax which has become due and payable) have been fully paid, orders distribution of said estate as follows:

It is ordered, adjudged, and decreed by the court, That said deceased died intestate,⁵ and left surviving, as his only heirs at law, those certain persons whose names and relationship to said deceased are as follows, to wit:

Names.	Relationship.	Residences.
_____	_____	_____
_____	_____	_____

And that the residue of the estate of said deceased, as hereinafter described, and all other property of said estate, whether described herein or not, be distributed according to law,⁶ as follows, to wit: To _____; ⁷ to _____; ⁸ and the residue as follows, to _____ and _____ and _____ each a _____ ⁹ part, etc.

The residue so distributed to said last-named persons, so far as the same is known, is described as follows, to wit: _____.¹⁰

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. If the matter has been continued, say, "and the hearing having been regularly postponed to the present time." 4. Or, _____ having appeared by _____, his attorney, and filed and presented objections and exceptions to said petition. 5. If a will has been probated, say, "that said deceased died testate, and that all of his property is disposed of by his will, as hereinafter decreed"; or, if partially intestate, say, "that said deceased died testate, disposing of only a part of his estate by will; and that all of said part is so disposed of by said will as hereinafter decreed." 6. And the provisions of said will, if any. 7-9. State name and fractional part. 10. Describe the residue.

§ 747. Form. Decree of distribution. (Another form.)

[Title of court.]

[Title of estate.]	{ No. _____ ¹ Dept. No. _____ [Title of form.]
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_____, administrator ² of the estate of _____, deceased, having on the _____ day of _____, 19____, filed in this court his petition, setting forth, among other matters, that all

accounts have been finally settled; that said estate is in a condition to be closed; and that a portion of said estate remains to be divided among the heirs of said deceased; and praying that said residue be distributed to the parties entitled thereto; and said matter coming on regularly to be heard this ____ day of ____, 19__, this court proceeds to the hearing of said petition, and it appearing to the satisfaction of this court that the clerk duly fixed the time and place for hearing said petition, and gave due notice thereof as required by law; that said accounts have been finally settled; that all taxes upon the property of the estate (and any inheritance tax which has become due and payable) have been fully paid; and that the residue of said estate, consisting of the property hereinafter particularly described, is now ready for distribution and that said estate is now in a condition to be closed;

And it further appearing that the residue of said estate is community property; that the said ____ died intestate,³ in the said county⁴ of ____, on the ____ day of ____, 19__, leaving surviving him those certain persons whose names and relationship to said deceased are as follows, to wit, ____;⁵ that, since the rendition of his said final account, the sum of ____ dollars (\$____) has come into the hands of said administrator;⁶ that the sum of ____ dollars (\$____) has been expended by said administrator⁷ as necessary expenses of administration, the vouchers whereof, together with a statement of such receipts and disbursements, are now presented and filed, and the payments are approved by this court; that the estimated expenses of closing said estate will amount to the sum of ____ dollars (\$____);⁸ and that the following-named persons are entitled to the residue of said estate, to wit, ____ and ____ and ____, —

Now, on this, the said ____ day of ____, 19__, on motion of ____, Esq., counsel for said administrator,⁹ and no objection being made thereto, —

It is hereby ordered, adjudged, and decreed, That the residue of said estate of ____, deceased, hereinafter particularly described, and now remaining in the hands of said administrator,¹⁰ and any other property which may belong

to the said estate, or in which the said estate may have any interest, be, and the same is hereby, distributed as follows, to wit: ____.¹¹

The following is a particular description of the said residue of said estate referred to in this decree, and of which distribution is ordered, adjudged, and decreed, as aforesaid, to wit: ____.¹²

Done in open court this ____ day of ____, 19____.
____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. Or, executor. 3. Or as the case may be. 4. Or, city and county. 5. Designate names and relationship. 6, 7. Or, executor. 8. In case of will insert: "that by the will of said decedent, which was duly admitted to probate herein on the ____ day of ____, 19____, said deceased devised and bequeathed his whole estate to the persons and in the proportions and manner in said will, and hereinafter, specified." 9, 10. Or, executor. 11. Give names of distributees, and proportion or share of each. 12. Give description.

**§ 748. Form. Decree of distribution to foreign executor.
(To be used for personal property only.)**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes ____, the executor of said estate, by ____, his attorney, and proves to the satisfaction of the court that his final account had been theretofore settled; that petition for distribution herein was filed on the ____ day of ____, 19____; that on the same day the clerk of this court appointed the ____ day of ____, 19____, for the hearing thereof; and that due and legal notice of the time and place of said hearing has been given as required by law;² and said petition being now presented to the court, and no person appearing to except to or contest said petition,³ the court, after hearing the evidence, being satisfied that all taxes upon the property of the estate (and any inheritance tax which has become due and payable) have been fully paid, orders distribution of said estate as follows:

It is determined, adjudged, and decreed by the court, That said executor has in his possession, belonging to said estate,

after deducting the credits to which he is entitled, a balance of _____ dollars (\$_____), of which _____ dollars (\$_____) is in cash, and the remainder consists of the following described personal property at the value of the appraisalment, to wit: _____; ⁴ that the will of said deceased has been duly admitted to probate in the _____ ⁵ court of the county of _____, state of _____; that said state was the place of residence of said deceased at the time of his death; that it is necessary, in order that the whole of said estate may be distributed according to the said will, ⁶ that the same be delivered to the executor of said estate in the said county of _____, state of _____, and it is therefore ordered that the executor herein appointed forthwith deliver to _____, the executor appointed by the said _____ ⁷ court of the county of _____, state of _____, the whole of said estate remaining in his hands as aforesaid.⁸

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. If the matter has been continued, say, "and the same having been by the court regularly postponed to the present time." 3. Or, _____ having appeared by _____, his attorney, and filed and presented objections and exceptions to said petition. 4. Describe the property. 5. Title of court. 6. Or, that a certain part of said estate hereinafter described may be distributed according to the said will. 7. Title of court. 8. Or, the following portion of said estate, to wit (describing the property).

§ 749. Distribution not to be made until taxes are paid. Before any decree of distribution of an estate is made, the court must be satisfied, by the oath of the executor or administrator, or otherwise, that all state, county and municipal taxes, legally levied upon property of the estate, and any inheritance tax which is due and payable have been fully paid. **Kerr's Cyc. Code Civ. Proc.**, § 1669.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1900.

Idaho. Code Civ. Proc. 1901, sec. 4279.

Montana. Code Civ. Proc., sec. 2847.

North Dakota. Rev. Codes 1905, § 8210.

Oklahoma. Rev. Stats. 1903, sec. 1759.

South Dakota. Probate Code 1904, § 311.

Utah. Rev. Stats. 1898, sec. 3956.

Wyoming. Rev. Stats. 1899, sec. 4832.

§ 750. **Continuation of administration.** In all cases where a decedent shall have left a will, in and by the terms of which the testator shall have limited the time for administration upon an estate left by him, and the executor, and all of the legatees or devisees named in the will, shall file and present to the court a petition, in writing, representing that it will be for the best interests of the estate, and of the beneficiaries under the will, to have the administration upon the estate continued for a longer period of time than that designated in such will, and that it would be injurious to the estate and to such beneficiaries, to have the administration brought to a close at the date therefor designated in the will, the court shall then set a day for the hearing of said petition; and notice thereof shall be served on all persons interested in the estate, in the same manner that summons in civil actions is served. Upon the day set for such hearing (or upon some other day to which the hearing may have been continued), the court shall proceed to hear proofs touching the representations made in such petition — and any person interested in the estate may also present counter-proofs in opposition to said application; and if, upon such hearing, it be made to appear to the court that the representations made by the petitioners in their said petition contained be true, the court may then, by its order and decree in that behalf, decree and direct that the administration upon the estate continue for and during such further period of time as in its judgment will best subserve the interests of the estate and of the beneficiaries under said will;

[**Second petition.**] Provided, however, that if, at any time during the period for which the administration upon the estate shall have been thus continued, the executor, or any one or more of the legatees or devisees, shall present to the court his or their petition, representing that it has become necessary for the best interests of the estate, and of the beneficiaries under the will, to have the administration upon

the estate closed, the court shall then set a day for the hearing of said last-named petition; and notice thereof shall be given in the same manner, and the same proceedings be had thereupon, as shall have been given for and had upon the hearing of the petition asking for the continuation of such administration. And if, upon such hearing, it shall be made to appear to the court that the representations made by such petitioners or petitioner (as the case may be) are true, the court shall then, by its order and decree in that behalf, decree and direct that the administration upon the estate be closed as soon thereafter as, under the circumstances, shall be practicable. **Kerr's Cyc. Code Civ. Proc., § 1670.**

ESTABLISHMENT OF HEIRSHIP, RIGHTS AND LIABILITIES OF HEIRS, AND DISTRIBUTION.

I. Proceedings to Determine Heirship.

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|----------------------------------|-------------------------|
| 1. Jurisdiction of courts. | (2) Parties. Pleadings. |
| (1) In general. | (3) Trial. |
| (2) Limitations of jurisdiction. | (4) Decree. |
| 2. Procedure. | (5) Costs. |
| (1) In general. | (6) Appeal. |

II. Rights and Liabilities of Heirs.

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| 1. Appointment of attorney for heirs. | (2) Against administrators individually. |
| 2. Vesting of property in heirs. Burdens. | 5. Limitation of actions by heirs. Laches. |
| (1) In general. | 6. Actions between heirs and devisees. |
| (2) Judgment liens against heirs. | 7. Rights of heirs to attack sale of property. |
| (3) Community property. | (1) For want of jurisdiction. |
| 3. Actions by heirs. | (2) For fraud. |
| (1) In general. | 8. Estoppel of heirs. |
| (2) In ejectment. | 9. Liability of heirs. |
| (3) To enforce trust. | (1) In general. |
| (4) In partition. | (2) Limitation of liability. |
| (5) On promissory notes. | 10. No allowance to heirs, of costs and expenses, from estate. |
| (6) To quiet title. | 11. Purchaser from heirs. |
| (7) Counterclaim will not be considered when. | (1) In general. |
| (8) Judgment for heirs as an estoppel. | (2) Purchaser does not acquire what. |
| 4. Actions by heirs against administrators. | 12. Mortgages by heirs and devisees, pending administration. |
| (1) In general. | |

13. Contract relinquishing right as heir.
14. Right of heirs to contest accounts. Jurisdiction to determine conflicting interests.

III. Distribution.

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| 1. In general. | (2) Power of court. |
| 2. Petition for distribution. | (3) Not an escheat. |
| 3. Notice. | (4) Notice. |
| 4. Limitations on distribution. | (5) Annuling will after distribution. |
| (1) In general. | (6) Error. Irregularity. Nullity. |
| (2) Payment of taxes. Collateral inheritance tax. | (7) Effect of decree. |
| 5. Delay of distribution. | (8) Conclusiveness of decree as to persons. |
| 6. Jurisdiction. | (9) Conclusiveness of decree as to subject-matter. |
| 7. Distribution with final accounting and settlement. | (10) Decree is not conclusive as to whom, and what. |
| (1) In general. | (11) Enforcement of decree, contempt, execution. |
| (2) Waiver of settlement of account. | (12) Collateral attack. |
| (3) Settlement of accounts. Notice. | (13) Vacating decree. Fraud. Equity. |
| (4) Distribution subsequent to final settlement. Power of court. | (14) Vacating premature decree. |
| 8. What matters may be adjusted. | (15) Loss of jurisdiction. |
| (1) In general. | 15. Payment. Duty of executors. |
| (2) Question of heirship. | 16. Distribution without decree. |
| 9. Consideration of will. | 17. Rights of creditors. Set-off. Garnishment. |
| 10. Objections to distribution. | 18. Actions by transferees of choses in action. |
| 11. Kinds of property. | 19. Appeal. |
| 12. Distributees. | (1) In general. |
| (1) In general. | (2) Stay of proceedings. |
| (2) Assignees. Shares "conveyed." Grantee. | (3) Who cannot appeal. |
| (3) Retention of distributee's share for debt. | (4) Distribution pending appeal. |
| (4) Right of action to recover property. | (5) Review. Certiorari. Writ of review. |
| 13. Distribution to non-residents. | (6) Reversal and its effect. |
| 14. Decree. | (7) Non-appealable orders. |
| (1) In general. | (8) Dismissal. |

I. PROCEEDINGS TO DETERMINE HEIRSHIP.

1. Jurisdiction of courts.

(1) In general. If the statute expressly provides that, upon proof of service of notice to the satisfaction of the court, "the court shall thereupon acquire jurisdiction to ascertain and determine

the heirship, ownership, and interest of all parties in and to the property of said deceased," and jurisdiction has thus attached, the provisions as to the time of future steps in the proceeding are merely directory, are not to be considered as conditions precedent, and are not of the essence of the proceeding: *Estate of Sutro*, 143 Cal. 487, 491; 77 Pac. Rep. 402. The court acquires jurisdiction to determine, and it is made its duty to determine, not alone the heirship to deceased, but also the interest of each respective claimant to his estate. That this may, and should, properly be done by a decree establishing the degree of kinship or relation in which the separate claimants stood to the deceased, does not admit of debate; and where a claimant is found to bear no kinship whatsoever to the deceased, a finding and judgment to that effect is properly within the jurisdiction of the court, and within the issues to be determined: *Estate of Blythe*, 112 Cal. 689, 694; 45 Pac. Rep. 6. Authorized proceedings for the ascertainment of heirship necessarily involve questions of title to the property of the estate, whether real or personal. "How is the court to exercise the jurisdiction given without trying and determining such questions?" *Estate of Burton*, 93 Cal. 459, 464; 29 Pac. Rep. 36; *Blythe v. Ayres*, 102 Cal. 254, 258; 36 Pac. Rep. 522. A proceeding for the determination of heirship to the estate of a decedent is not a civil action, but a special proceeding, and is embraced within the scope of "matters of probate." It is therefore within the jurisdiction of a court sitting in matters of probate: *Smith v. Westerfeld*, 88 Cal. 374, 379; 26 Pac. Rep. 206; *Estate of Burton*, 93 Cal. 459, 463; 29 Pac. Rep. 36; *Estate of Joseph*, 118 Cal. 660, 663; 50 Pac. Rep. 768. It is embraced within the scope of "matters in probate," as clearly as is the proceeding for the sale of real property to pay the debts of an estate: *Estate of Blythe*, 110 Cal. 226, 228; 42 Pac. Rep. 641. No distinct "court of probate" has been created or recognized by the present constitution of California; but the superior court is vested with jurisdiction "in matters of probate"; and such a court, while sitting in matters of probate, is the same as it is while sitting in cases of equity and in cases of law, or in special proceedings; and when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancillary to a proper judgment in such case, and this applies to proceedings for the ascertainment of heirship: *Estate of Burton*, 93 Cal. 459, 463; 22 Pac. Rep. 36. Where questions have been litigated under the provisions of the statute relating to the determination of heirship, and have been determined before an application for distribution is made, the determination of such questions shall be conclusive in the distribution of the estate: *Blythe v. Ayres*, 102 Cal. 254, 259; 36 Pac. Rep. 522. In a proceeding to determine heirship, an order adjudging the default of persons for

not appearing, but adding that it is without prejudice to the rights of persons who have petitions filed for distribution in such proceeding, does not deprive the court of jurisdiction: *Estate of Sutro*, 142 Cal. 487, 490; 77 Pac. Rep. 402. A court must enter a default against all parties failing to prosecute or to defend their rights, as well as those who fail to appear or plead: *Estate of Kasson*, 141 Cal. 33, 40; 74 Pac. Rep. 436; and where an order is made by the court, adjudging all persons who did not appear therein to be in default, a subsequent order refusing to open the default at the instance of a non-resident heir, who did not know of the proceeding until after the default, is within the jurisdiction of the court, and will not be disturbed upon certiorari: *Hitchcock v. Superior Court*, 73 Cal. 295; 14 Pac. Rep. 872. Enumeration of steps to be taken under the California statute for the determination of heirship: See *Blythe v. Ayres*, 102 Cal. 254, 258; 36 Pac. Rep. 522.

REFERENCES.

Question of heirship is subsidiary to, and may be considered on, distribution: See Division III, head-line 8, subd. 2, post.

(2) **Limitations of jurisdiction.** Where the provisions of the statute are carefully limited to the ascertainment and determination of the rights and interest claimed in privity with the estate, they are not applicable to rights or titles claimed adversely to such estate: *Estate of Burton*, 93 Cal. 459, 461; 29 Pac. Rep. 36. Such a statute provides no means of determining adverse claims, or what property belongs to the estate. The purpose is to determine heirship and the ownership of property of the estate, and the decree is made conclusive only in distribution and of title to property of the estate: *McDonald v. McCoy*, 121 Cal. 55, 72; 53 Pac. Rep. 421. Neither does such a statute provide for the probate of a will, and the court should not proceed, as a part of an action under such statute, to hear and determine the matter of the probate of a will. It is clearly the law that a will cannot be received in evidence to maintain a title founded upon it until it has been admitted to probate: *Estate of Christensen*, 135 Cal. 674, 676; 68 Pac. Rep. 112. In a proceeding under such a statute, the court has jurisdiction of the claims of assignees of the heir, but it has not been held that its jurisdiction extends to claims of an equitable nature against the legal owner, or in other words, to trusts. A probate court has no equitable jurisdiction beyond what is involved in the exercise of its peculiar functions, which are to administer and to distribute the estate. But where a trust has been created by will, the validity of the trust is necessarily involved in the question of distribution, for, if invalid, the bequest fails. Hence, as necessary to distribution, it is within the province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate, derived from the will. The

probate court has no jurisdiction over trusts, not derived from the will. The jurisdiction of the court, either on distribution, or in a proceeding for the ascertainment of the heirs of an estate, is merely to determine the persons entitled, under the will or by succession, or their grantees; and in neither case are the equitable claims of parties against the heirs, or assignees of heirs, a proper subject for its consideration: *More v. More*, 133 Cal. 489, 495; 65 Pac. Rep. 1044. Where no proceeding for the determination of heirship can be inaugurated until the expiration of one year after the issuance of letters of administration, no jurisdiction can be acquired by a court where the petition is filed within less than four months after the issuance of such letters: *Smith v. Westerfield*, 88 Cal. 374, 380; 26 Pac. Rep. 206; but, where the court has clearly acquired jurisdiction, such jurisdiction cannot be ousted by a failure to comply strictly with the subsequent steps in the proceeding, which are merely directory, though the action or proceeding in question be statutory or in rem: *Estate of Sutro*, 143 Cal. 487, 492; 77 Pac. Rep. 402. The jurisdiction of a superior court in proceedings to determine heirship is limited and special. Whenever its acts are shown to have been in excess of the power conferred upon it, or without the limits of this special jurisdiction, such acts are nugatory, and have no binding effect, even upon those who have invoked its authority, or submitted to its decision: *Smith v. Westerfield*, 88 Cal. 374, 379; 26 Pac. Rep. 206; *Estate of Strong*, 119 Cal. 663, 666; 51 Pac. Rep. 1078. Where there is a statute providing for the determination of heirship, it would seem that, upon partial distribution, jurisdiction to determine the question of contested heirship, or right to inherit, could only be acquired by proceeding under such a statute, but, in California, it has been held that such question may be determined on such petition, under statutes providing for the partial distribution of an estate: *Estate of Jessup*, 81 Cal. 408, 415; 6 L. R. A. 594; 21 Pac. Rep. 976; 22 Pac. Rep. 742, 1028.

2. Procedure.

(1) **In general.** In a proceeding to determine heirship, every party is an independent actor, and is a plaintiff as against all other parties whose claims are adverse. When the pleadings of all the parties are in, the subsequent proceedings shall be the same as in an ordinary civil action, and the provisions regulating the mode of procedure for the trial of civil actions are applicable to this proceeding. If it does not appear that the judge cannot fairly and impartially try the cause, a motion to disqualify him for bias and prejudice is properly denied. If a party, who claims to be an heir, fails to appear and introduce any proof in support of his claim, it is proper for the court to enter a nonsuit as to him; and any error in granting such nonsuit, which occurred at the trial, and which should have been excepted to at that time, will not be considered on appeal: *Estate of Kasson*,

141 Cal. 33, 40; 74 Pac. Rep. 436. Where the law of descent of estates is applicable, on the death of an Indian allottee after the primary patent or certificate is issued, a state court has jurisdiction of the subject-matter, and its decree determining the heirs in such cases is valid. The determination, by a state court, of the heirs of a deceased Indian allottee is not an execution of the trust. The finding of such fact is not an interference with the primary disposal of the soil, but is in aid of the general government in protecting the rights of its cestui que trust: *Kaylton v. Kaylton*, 45 Or. 116; 78 Pac. Rep. 332, 333. All of the property of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the probate court: *Reed v. Stewart*, 12 Ida. 699; 87 Pac. Rep. 1002, 1004; and since the title vests in the heir at the time of the decedent's death, he is entitled thenceforth to be heard as to the disposition of the estate: *In re Sullivan's Estate*, 36 Wash. 217; 78 Pac. Rep. 945, 948; *Reed v. Stewart* (Ida.), 87 Pac. Rep. 1002, 1004; and the mere fact that a resistance to his claim of heirship may exist does not deprive him of such right. The administrator, who seeks to pay out the funds of an estate for his own and counsel's services must recognize the right on the part of all who claim to be heirs or devisees, and who proceed in a regular way to be heard, until conflicting claims have been finally adjudicated: *In re Sullivan's Estate*, 36 Wash. 217; 78 Pac. Rep. 945, 948. In Utah, a statutory proceeding, which is in the nature of a special proceeding for the determination of heirship and right of succession, cannot be commenced until the expiration of one year after the death of the decedent, and then only in the event that letters of administration have not been applied for. Hence, where the year has not elapsed, and an administrator has been regularly appointed, and the estate is in process of settlement in the probate court, that court has exclusive original jurisdiction to determine all questions of heirship and descent: *Garr v. Davidson*, 25 Utah, 335; 71 Pac. Rep. 481, 482.

(2) **Parties. Pleadings.** Under the California statute, to determine heirship, the one who proceeds first and files a complaint, is, for convenience, treated as plaintiff, and the others as defendants. The plaintiff is to file a complaint setting forth the facts constituting his claim of heirship, ownership, or interest in the estate, with such reasonable particularity as the court may require; and the defendants shall set forth, in their respective answers, the facts constituting their claim of heirship, ownership, or interest in said estate, with such particularity as the court may require. It is thus seen that the pleading of each party, whether plaintiff or a defendant, is to contain exactly the same matter. It is clear, therefore, that the alleged right of each party, whether nominally a plaintiff or a defendant, is as much before the court for final adjudication as is the alleged right

of any other party; and it is the plain duty of the court to determine the alleged claims of each party to the proceeding: *Blythe v. Ayres*, 102 Cal. 254, 260; 36 Pac. Rep. 522; *Estate of Kasson*, 127 Cal. 496, 505; 59 Pac. Rep. 950. The fact that a person is styled a "defendant," in the title of the pleadings in such an action, does not fix his status in the proceeding. In such a proceeding each party is an independent actor, and is a plaintiff as against all other persons whose claims are adverse. When the pleadings of all the parties are in, the subsequent proceedings shall be the same as in an ordinary civil action, and the provisions of the statute which regulate the mode of procedure for the trial of civil actions are applicable to such a proceeding: *Estate of Kasson*, 141 Cal. 33, 40; 74 Pac. Rep. 436. No party has a standing in the trial court in such a proceeding unless he has averred his claim of heirship, etc., and has set forth the facts constituting such claim, and he will not be heard to contest the right of another claimant if he does not set up any right in himself: *Blythe v. Ayres*, 102 Cal. 254, 260; 36 Pac. Rep. 522. If proceedings are pending for the settlement of the estate of a deceased testator, one who claims to be an heir at law, who, in case residuary legacies are void, might succeed to some of the estate, cannot maintain an action in equity, for the purpose of determining his heirship and having some of the legacies pronounced void, where no reason is shown why this matter should be determined in advance of the decree of final distribution: *Siddall v. Harrison*, 73 Cal. 560, 564; 15 Pac. Rep. 130; *Goldtree v. Thompson (Cal.)*, 15 Pac. Rep. 359. In a proceeding to determine heirship under the law of California, brought by pretermitted heirs, where one claiming under a devisee in the will had procured a partial distribution of the estate to himself, and asserted possession adverse to the pretermitted heirs as a bar to their rights, but no final distribution had been made, his entry should be held to be that of a tenant in common with the pretermitted heirs, and he could not acquire title by limitation against them, pending administration: *Estate of Grider*, 81 Cal. 571, 578; 22 Pac. Rep. 908. Where a petition has been filed for the purpose of ascertaining and declaring the rights of all persons to an estate, and to whom distribution thereof shall be made, the administrator of such estate, although made a formal party to the proceeding, has no right to litigate the claim of one alleged heir as against another, where he is not alleged to be a claimant to the estate: *Roach v. Coffey*, 73 Cal. 281, 282; 14 Pac. Rep. 840.

(3) **Trial.** Under a statute providing for the determination of heirship, each person who appears, and, either by complaint or answer, sets up a claim of heirship, etc., peculiar to himself, is an actor, and has a separate and independent right to conduct his case according to his own judgment, including the right to ask proper questions of

witnesses of a hostile party. The averments of the pleadings show which parties are hostile to each other, and each has a right to cross-examine the witnesses of a hostile party: *Estate of Kasson*, 127 Cal. 496, 505; 59 Pac. Rep. 950. It is entirely proper to submit to a jury issues of fact raised by the petition in a proceeding for the determination of heirship: *Estate of Sheid*, 122 Cal. 528, 532; 55 Pac. Rep. 328.

(4) **Decree.** A decree to determine heirship is properly entered when spread at length upon the minute-book of the probate court. It is not necessary that it should be entered in the judgment-book; *Estate of Blythe*, 110 Cal. 229, 230; 42 Pac. Rep. 642. As a party is concluded by the decree in proceedings to determine heirship, so far as the distribution of the estate is concerned, a party who is found to have no interest in the estate ceases to be a party interested therein, and cannot afterward appeal from a decree distributing the estate: *Estate of Blythe*, 108 Cal. 124, 128; 41 Pac. Rep. 33. One whose claim of heirship or interest in an estate has been decided adversely to him cannot afterwards be heard to affirm the contrary upon appeal from a decree of distribution of the estate: *Estate of Blythe*, 112 Cal. 689, 694; 45 Pac. Rep. 6. As the statute which authorizes an action to determine heirship and the ownership of property in the estate of a deceased person does not authorize the determination of adverse claims by third persons to the property, a judgment in such action is not conclusive as to persons claiming the property as their own, where they did not appear in the heirship proceedings, though made parties thereto: *McDonald v. McCoy*, 121 Cal. 55, 72; 53 Pac. Rep. 421.

(5) **Costs.** In a proceeding to determine heirship, the court has a discretion to apportion the costs between the parties, where the circumstances call for such action on the part of the court; otherwise the losing party is liable for the costs, as any other losing party in a civil action: *Lindy v. McChesney*, 141 Cal. 351, 353; 74 Pac. Rep. 1034. Under a statute which gives a court discretion to apportion the costs of a proceeding for the ascertainment of the rights of persons claiming as distributees of the estate of a decedent, and where the claimant claims the entire estate, but is unsuccessful, it is not improper to tax him with the entire cost of the proceeding, including the expense of taking depositions, though they were not used on the trial, unless it be shown that they were unnecessary, or that, for some special reason, such disbursement should not be allowed: *Lindy v. McChesney*, 141 Cal. 351; 74 Pac. Rep. 1034.

(6) **Appeal.** All appeals and proceedings to determine heirship must be taken within the prescribed statutory time from the date of

the entry of the judgment, or the order complained of. If not taken within that time, the appeal from the judgment is too late: *Estate of Grider*, 81 Cal. 571, 574; 22 Pac. Rep. 908; *Smith v. Westerfield*, 88 Cal. 374, 381; 26 Pac. Rep. 206; *Estate of Westerfield*, 96 Cal. 113; 30 Pac. Rep. 1104. In such a proceeding, a party who does not except to or attack a finding that he is not akin to the deceased is not a "party aggrieved," and has no standing as an appellant from the decision in favor of the person who is found to be the sole heir of the deceased: *Blythe v. Ayres*, 102 Cal. 254, 257; 36 Pac. Rep. 522. Under the laws of Wyoming, a judgment in a proceeding to determine heirship is appealable: *Weidenhott v. Primm* (Wyo.), 94 Pac. Rep. 453. A finding of fact by a jury or trial judge in such a proceeding, which is the result of the consideration of evidence that is really and materially conflicting, will not be disturbed on appeal: *Blythe v. Ayres*, 102 Cal. 254, 261; 36 Pac. Rep. 522. The object of a statute to determine heirship is to expedite the distribution of the estate, by enabling persons claiming interests to have their claims determined in advance of the application for distribution; and, as the question of heirship may be determined on the hearing of the petition for distribution, the court has a discretion either to hear and determine the whole matter, or to postpone it; and this discretion will not be interfered with on appeal, unless it has been abused: *In re Oxarart*, 78 Cal. 109, 112; 20 Pac. Rep. 367.

II. RIGHTS AND LIABILITIES OF HEIRS.

1. **Appointment of attorney for heirs.** The appointment of an attorney for absent heirs, and the allowance to him of a fee, are matters entirely within the discretion of the probate court, and if such allowance be improvident or indiscreet, the court may vacate it at the suggestion of any one, or upon its own motion: *Estate of Bety*, 75 Cal. 256, 258; 17 Pac. Rep. 65. Under a statute providing for the appointment by the court of an attorney to represent absent heirs, it will be presumed that the appointment and the allowance made by the trial court for services rendered by such attorney are justified: *Estate of Simmons*, 43 Cal. 543, 547.

REFERENCES.

That section of the California code authorizing the court to appoint an attorney for minor or absent heirs, devisees, legatees, or creditors has been repealed: See *Kerr's Cal. Cyc. Code Civ. Proc.*, § 718, and notes thereto.

2. Vesting of property in heirs. Burdens.

(1) **In general.** Real estate acquired by an administrator, in obtaining satisfaction of a judgment, forming a part of the assets of the estate in his hands for settlement, is to be treated, for pur-

poses of administration, as personal property. The heirs do not take title to such real estate by descent from their ancestors, nor until the probate court of proper jurisdiction has exhausted its authority over it by an order of distribution, either general or special, which is final in character: *Weir v. Bagby*, 72 Kan. 67; 82 Pac. Rep. 585. While it is true that the descent is cast, and property of the decedent is vested in the devisees and legatees, or in the heirs, at the moment of the death of the deceased, it is also true that they take the property subject to whatever charges the legislature has seen fit to impose upon it. They take the property subject to the payment of the expenses of administration, subject to charges that the law fixes upon it for the support, maintenance, and comfort of the widow and family of the deceased, and subject to the liability to have these charges enforced by orders of the court, made without notice, in pursuance of the statute, other than that given for the initiation of the administration by the giving of a general notice as prescribed by law; and the enforcement of these charges in the authorized mode is not a violation of any constitutional right of the heir, devisee, or legatee: *Estate of Bump* (Cal.), 92 Pac. Rep. 643, 644. The estate of the heir which vests in him at once on the death of the ancestor subject to the burdens imposed by the law at the time is indefeasible, except in satisfaction of such burdens. The legislature has no more right to order a sale of such vested interest for other reasons than those prescribed by law, than it has to direct the sale of the property of any other person acquired in any other way; and a sale made under authority so conferred by the legislature is invalid: *Brenham v. Story*, 39 Cal. 179, 180. The principle that, upon the death of the ancestor, the heir at once becomes vested with the full property, subject only to burdens then existing, or imposed by the law then in force, is not affected by an amendment to the statute passed after the death of the ancestor, providing that property may be sold by the representative for other reasons than those prescribed by the statute in force at the time of the ancestor's death: *Estate of Packer*, 125 Cal. 396, 399; 58 Pac. Rep. 59; 73 Am. St. Rep. 58; *Estate of Newlove*, 142 Cal. 377, 379; 75 Pac. Rep. 1083. A statute which authorizes a sale of the property of an estate, when it appears for the advantage of the estate, without reference to the existence of debts, if in force at the time of the death, divests no one of his property: *Estate of Porter*, 129 Cal. 86, 90; 61 Pac. Rep. 659; 79 Am. St. Rep. 78. The descent of real property is governed by the laws of inheritance in the state where the land is situated. Title to the same cannot be affected by the decree of a court of another state: *Cooper v. Ives*, 62 Kan. 395; 63 Pac. Rep. 434. When a member of a mutual benefit society has made his certificate payable to his heirs, they do not take the fund by descent, but by contract; and the statutes of descent and distribution do not apply when such

heirs have been found: *Burke v. Modern Woodmen of America*, 2 Cal. App. 611; 84 Pac. Rep. 275, 276.

REFERENCES.

Rights of an heir in the personal property of his ancestor: See note to 112 Am. St. Rep. 727-735. Right of heirs to exemption of homestead from ancestor's debts contracted prior to its acquisition by him: See note 4 L. R. A. (N. S.), 544. Right of devisee of encumbered real estate to exoneration at the expense of legatees of personal property: See note 3 L. R. A. (N. S.), 898-903. Right of devisees of land encumbered by a testator to have such encumbrance discharged out of personalty to the disappointment of legatees: See note 8 Am. & Eng. Ann. Cas. 592.

(2) **Judgment liens against heirs.** The estate of an heir or devisee vests in him on the death of the decedent, subject to administration, and a judgment recovered against an heir or devisee, pending administration, becomes a lien on such interest, which lien is not terminated by the conveyance of the heir or devisee or by distribution to his grantee: *Martinovich v. Marsicano*, 127 Cal. 354, 356; 70 Pac. Rep. 459.

(3) **Community property.** Where a wife died, leaving an only child and her husband surviving, and there was no administration upon her estate, or upon the community property, it will be presumed, in favor of the child, after the mother has been dead for eight years, that, as to the community real property, there was no necessity for administration, and that the right of a child to the possession of his share in the community real estate as heir of his mother is complete. It ought to be presumed, in favor of a child, either that there were no community debts, or that they have been paid or barred: *Young v. Young*, 7 Wash. 33; 34 Pac. Rep. 144, 145.

3. Actions by heirs.

(1) **In general.** A statute which provides that the heirs or devisees may maintain an action for the recovery of the real estate, against any one except the administrator or executor, is not applicable to a remainderman, although he may have received his estate through a devise, and therefore is literally in the general category of "devisee." It means only those heirs and devisees who have a present right of possession, and therefore a present cause of action as against every one except the administrator: *Pryor v. Winter*, 147 Cal. 554; 82 Pac. Rep. 202, 203. Upon the death of a mother, her property rights go to her legal representatives, and they alone can bring suit to establish the validity of a claim against the estate. The daughter has no legal capacity to maintain a suit "to collect an undistributed share

of an undivided portion of an unsettled estate": *Hall v. Cowells' Estate*, 15 Col. 343; 25 Pac. Rep. 705, 706. Actions in relation to the real estate of an ancestor can be maintained by the heir only after the close of administration, unless some special circumstance appears which takes the case out of the general rule: *Hazelton v. Bogardus*, 8 Wash. 102; 35 Pac. Rep. 602, 603. A direction to the executor, in a will, to convert all property of the testator into money as soon as practicable after death, is not a devise, and vests no title in the executor, nor does it deprive the heir of the right to maintain an action for the possession of real estate, of which the testator held the fee, against any person other than the executor: *Estep v. Armstrong*, 91 Cal. 659, 663; 27 Pac. Rep. 1091. The ordinary and usual way in which the title of the ancestor descends to the heir, in such shape as to make it available to him, is by a decree of distribution; and he cannot maintain an action with reference thereto until such decree has been rendered by the probate court, unless special circumstances are alleged and proved to show that administration of the estate of the deceased is unnecessary: *Balch v. Smith*, 4 Wash. 497; 30 Pac. Rep. 648, 650; *Lawrence v. Bellingham Bay etc. R. R. Co.*, 4 Wash. 664; 30 Pac. Rep. 1099. Where letters of administration have been granted in one county, the next of kin of decedent have such an interest as to entitle them to maintain a proceeding for a writ of prohibition to prevent another court from assuming jurisdiction of the estate: *Dungan v. Superior Court*, 149 Cal. 98, 104; 84 Pac. Rep. 767. An action for damages to the freehold may be maintained by the sole devisee in possession, in her individual capacity, and judgment in such action would bar her recovery for the same cause as executrix: *Colton v. Onderdonk*, 69 Cal. 155, 158; 10 Pac. Rep. 395; 58 Am. St. Rep. 556. The heirs of a deceased partner cannot maintain an action against a surviving partner or his personal representative for an accounting as to partnership affairs. The surviving partner is not required to account with the heirs, but with the personal representative of the deceased partner; and the title of the heirs to partnership assets is subject not only to the settlement of the partnership affairs, but also to the administration of their ancestor's estate: *Robertson v. Burrell*, 110 Cal. 568, 574; 42 Pac. Rep. 1086. Sufficient complaint showing that plaintiff heirs were the owners of a fund loaned to a mortgagee by the administrator: See *Chaves v. Myer (N. M.)*, 85 Pac. Rep. 233. The heirs may bring, against the widow of the deceased, a suit to set aside a deed made by the intestate, alleged to have been executed under undue influence: *Trubody v. Trubody*, 137 Cal. 172; 69 Pac. Rep. 968.

REFERENCES.

Right of legatee of distributee to sue for assets belonging to decedent's estate: See note 4 Am. & Eng. Ann. Cas. 193.

(2) **In ejectment.** Pending the administration of an estate, the heirs cannot recover, in ejectment, the portion inherited by them, as against the administrator, who is entitled to the possession of the whole estate, until it shall have been settled or delivered over by order of the court; and this applies to the executors of a foreign will, as well as to the administrators of a domestic will. Administration of the estate under the will is set on foot at the time the will is admitted to probate; and the administration thus shown to have been instituted will be presumed to have been in progress at the date of the institution of the action, where the action was brought soon after the probating of the will: *Plass v. Plass*, 121 Cal. 131; 53 Pac. Rep. 448, 450; *Dunn v. Peterson*, 4 Wash. 170; 29 Pac. Rep. 998. But the possession of an executor is that of the heir or devisee, and, as against third persons, the latter can maintain an action of ejectment, as well as the former. Hence one who is in possession of land as a sole devisee, pending settlement of the testator's estate, may maintain an action for the recovery of damages for a trespass to such land while he is in possession thereof: *Colton v. Onderdonk*, 69 Cal. 155, 158; 10 Pac. Rep. 395. The right to the possession of the real property of an intestate remains exclusively with the administrator until the estate is settled, or distribution is directed by order of the probate court. Until such time, neither the heirs nor their grantees can maintain ejectment for any portion of such property: *Meeks v. Hahn*, 20 Cal. 620, 629. An heir or devisee, or their grantees, are not entitled to the possession of their share of decedent's estate, and cannot maintain ejectment therefor until the administration of the estate is closed: *Chapman v. Hollister*, 42 Cal. 462; *Meeks v. Kirby*, 46 Cal. 168. But this principle does not apply to a case where the claim is by one not bearing such a relation to the estate, and who claims the property as his own, and impliedly denies that it is a part of the decedent's estate: *Lamme v. Dodson*, 4 Mont. 560; 2 Pac. Rep. 298. An heir cannot maintain ejectment for the reason that the real estate is in the possession, actual or constructive, of the administrator, and he should not be allowed to maintain an action to quiet title, for the reason that it is the duty of the administrator to take every step necessary to protect the interest of the estate: *Hazelton v. Bogardus*, 8 Wash. 102; 35 Pac. Rep. 602, 603. As against strangers, the right of the heir to the possession of land belonging to the estate has been expressly recognized: *Berry v. Eyraud*, 134 Cal. 82, 83; 66 Pac. Rep. 74; *McFadden v. Ellmaker*, 52 Cal. 348, 350. Where there are no creditors, nor costs or debts of any kind outstanding against the estate, and the administrator has declined to bring suit, and has waived his right to do so, in favor of the heirs, the latter may maintain ejectment in their own names for property which had descended to them from their ancestor: *Gossage v. Crown Point etc. Co.*, 14 Nev. 153, 160. Under the statutes

of Washington, an heir, as such, without any allegation as to administration, or the want or necessity of it, cannot maintain an action for the recovery of property alleged to have belonged to his ancestor: *Balch v. Smith*, 4 Wash. 497; 30 Pac. Rep. 648. Where no administration has been taken out on the estate of a decedent, the heir or devisee may maintain ejectment for the real estate; but if administration has been granted, and there is a temporary vacancy in the office of the representative, pending administration, the heir or devisee cannot maintain ejectment during the vacancy, and his grantee is bound by the same rule: *Chapman v. Hollister*, 42 Cal. 462, 464.

REFERENCES.

Actions by heirs to recover possession of property before distribution in probate: See note 23 Am. Dec. 200-203.

(3) **To enforce trust.** An action to establish a trust and to compel a conveyance of the legal title to real estate is properly brought by the heirs of a deceased beneficiary, and the administrator of his estate is not the proper party to bring such action: *Janes v. Throckmorton*, 57 Cal. 368, 387. A suit in equity to set aside conveyances by a decedent and to enforce a constructive trust in the property so conveyed, may properly be brought by one of the heirs for the benefit of himself and co-heirs: *Kimball v. Tripp*, 136 Cal. 631, 635; 69 Pac. Rep. 428.

(4) **In partition.** The title to land descends to heirs at law subject to administration of the testator's estate, and subordinate to the testator's testamentary disposition thereof. The right of the heirs at law to the land may be superseded by the provisions of a will, and a decree directing its sale and a distribution of the proceeds. The heirs, therefore, have no such estate or interest in the land, or right to its possession, as will enable them to maintain an action of partition respecting it: *Bank of Ukiah v. Rice*, 143 Cal. 265; 76 Pac. Rep. 1020, 1021. A suit for partition of land cannot be maintained by an administrator of an estate, and a statutory provision, that, for the purpose of bringing suits for partition, the possession of executors or administrators is the possession of the heirs or devisees, evidently refers to such suits brought by heirs or devisees. The intent is to give them all the rights which actual possession would give them, and to make the possession of the administrator the same as if the heirs or devisees were actually in possession, preserving, however, all the rights of the executor or administrator for the purposes of administration: *Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 484; 58 Pac. Rep. 908. Heirs suing for the possession and partition of real estate to which they have acquired title by descent are not required to show, as a condition precedent to recovery, that the land

is not subject to appropriation for the payment of the decedent's debts: *O'Keefe v. Behrens*, 73 Kan. 469; 85 Pac. Rep. 555.

(5) **On promissory notes.** The heir of a deceased indorsee of a promissory note cannot maintain an action thereon until the termination of the probate proceedings, and a showing that he became the owner of the note by an order or distribution made by the probate court: *Mears v. Smith* (S. D.), 102 N. W. Rep. 295, 296, 297.

REFERENCES.

Action by heir against executor on promissory note belonging to decedent: See head-line 4, subd. 2, post. Actions by heirs in respect to personal estate: See note 112 Am. St. Rep. 731-735.

(6) **To quiet title.** The heirs of a decedent may maintain or defend in their own names an action to quiet title to land in which it is claimed decedent was interested: *Tryon v. Huntoon*, 67 Cal. 325, 329; 7 Pac. Rep. 741. Heirs or devisees of a decedent may properly be joined with a special administrator of the estate in a suit to quiet title to the property of the estate: *Miller v. Luco*, 80 Cal. 257, 259, 260; 22 Pac. Rep. 195. Actions in relation to the real estate of the ancestor can only be maintained by the heir after the close of administration, unless some special circumstance appears which takes the case out of the general rule. This principle applies to actions to quiet title, the same as in actions in ejectment: *Hazelton v. Bogardus*, 8 Wash. 102; 35 Pac. Rep. 602, 603.

(7) **Counterclaim will not be considered when.** If the administrator of an estate refuses to bring an action to recover property from the widow, which is alleged to belong to the estate, and the heirs bring such action, counterclaims as to the widow's allowance, and as to her interest in the estate, will not be considered in an action on an appeal bond given in the first-named action: *Bem v. Shoemaker*, 10 S. D. 453; 74 N. W. Rep. 239, 241.

(8) **Judgment for heirs as an estoppel.** If heirs are permitted to sue on behalf of an estate, a judgment recovered by them will estop the administrator from presenting another claim on account of the same judgment: *Sixta v. Heiser*, 14 S. D. 346; 85 N. W. Rep. 598, 599.

4. Actions by heirs against administrators.

(1) **In general.** If the administrator of an estate dies, and the heirs bring an action against the administratrix of such deceased administrator, the new administrator of the original estate is a proper, if not necessary, party to the action, where he is hostile to the interests of the heirs: *Sixta v. Heiser*, 14 S. D. 346; 85 N. W. Rep.

598, 599. Where the heirs of a deceased person, after the estate has been finally settled in the probate court, bring an action in the district court against the former administrator and others, and set forth in their petition that the defendants, through conspiracy and fraud, procured fraudulent judgments and orders to be entered in the probate court, and committed other wrongs, whereby they cheated and defrauded the heirs out of a large proportion of the estate, and that plaintiff had no knowledge of such wrongs and frauds until after the final settlement in the probate court, and petitioners pray to have the aforesaid judgments and orders set aside, and for other relief, such petition states a cause of action, and only one, and the district court has jurisdiction of the same: *Gafford v. Dickinson*, 37 Kan. 287; 15 Pac. Rep. 175. A devisee of land, under the will of decedent, cannot maintain an action for rents and profits of such land received by the executrix, but not accounted for by the latter, where the devisee has allowed the accounts of the executrix to be settled without objection. The settlement of the accounts is conclusive upon all such parties interested: *Washington v. Black*, 83 Cal. 290, 294; 23 Pac. Rep. 300. The heirs of a decedent cannot maintain an action on the bond of the administrator to recover funds misapplied by the latter until after the settlement of his accounts, and a refusal by him to pay any sum adjudged against him on such settlement: *Weihe v. Statham*, 67 Cal. 84; 7 Pac. Rep. 143. If an administrator purchases land in his own name, with funds of the estate, the heirs are entitled to have such land adjudged to be trust property: *Merket v. Smith*, 33 Kan. 66; 5 Pac. Rep. 394. Heirs have the right to sue the administrator and all others interested to recover a debt due to the estate when the administrator has refused to bring suit therefor: *Trotter v. Mutual Reserve Fund etc. Assoc.*, 9 S. D. 596, 600; 70 N. W. Rep. 843. The administrator of a decedent's estate is entitled to the possession of the property, pending administration, and a judgment in ejectment against him in favor of the heirs is improper: *Burgel v. Prisser*, 89 Cal. 70, 72; 26 Pac. Rep. 787. Where an heir abandons a homestead, he cannot afterwards, in an action against the administrator, recover the proceeds of its sale as exempt to him: *Miller v. Baker*, 9 Kan. App. 883; 58 Pac. Rep. 1002, 1003. For circumstances under which an agreement by the heirs not to sue one executor does not release his co-executor, see *Estate of Sanderson*, 74 Cal. 199, 212; 15 Pac. Rep. 753.

(2) **Against administrators individually.** An action against an administrator under a statute which authorizes distributees to "demand, sue for, and recover their respective shares from an administrator or executor, or any person having the same in possession," is an action against the executor or administrator individually, and not against him in his representative capacity. It is not an action against

the estate. If against the estate, the rights of the distributee are fully adjudicated by the decree of distribution: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 865. In an action against an executrix in an individual capacity, her refusal to pay over moneys, which, under the decree, it was her duty as executrix to pay, the words "as executrix," etc., in the title of the action, are merely descriptive: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 865. An action by a distributee against an administrator for the share distributed to the former may be brought against the latter individually, and no demand is necessary before suit: *Melone v. Davis*, 67 Cal. 279; 7 Pac. Rep. 703. If a decree of distribution has been made, and the court has ordered a distributee's share in the estate of the decedent to be paid to the heir within a certain time, and such time has elapsed without payment, an action to recover such share should be brought against the administrator individually, and not in his representative capacity; and no demand on the defendant, as administrator, and refusal to pay, need be alleged. The defendant, in such case, is liable in contempt for not making the payment under the decree, and as to him, the suit brought is a sufficient demand: *Melone v. Davis*, 67 Cal. 279; 7 Pac. Rep. 703, 704. An unauthorized payment of the shares of certain distributees of an estate to an attorney leaves the executor liable therefor, which liability is not affected by the "judgment or decree discharging him from all liability incurred thereafter": *Bryant v. McIntosh*, 3 Cal. App. 95; 84 Pac. Rep. 440, 441. A suit by heirs against an executor, on a promissory note, alleged to have belonged to the decedent, but fraudulently destroyed by the executor, and omitted from his inventory and accounts, is barred by a decree settling the executor's final account, where plaintiffs appeared at the hearing and filed objections to the account: *Tobelman v. Hildebrandt*, 72 Cal. 313, 316; 14 Pac. Rep. 20.

5. Limitation of actions by heirs. Laches. The validity of a claim against the estate of a decedent is not necessarily determined by its antiquity, but when the ancestor permits a period exceeding thrice the statute of limitations to go by without an attempt at legal enforcement, the heir should be held to strict proof of whatever may be necessary to take the case out of the operation of the statute, and of what may be essential to a recovery: *Hall v. Cowles' Estate*, 15 Col. 343; 25 Pac. Rep. 705, 706. If an administrator or trustee allows the statute of limitations to run so as to bar his rights as such, he lays himself liable to the heir, or any one else injured by his failure to perform his duty: *Jenkins v. Jenson*, 24 Utah, 108; 66 Pac. Rep. 773, 778. The rule that the statute of limitations does not bar a trust estate holds only between cestui que trust and trustee, and not as between the cestui que trust and trustee on the one side, and strangers on the other. Hence, in an action between one claiming

as heir to an estate on the one hand, and strangers to the estate on the other, as where a posthumous heir of the intestate, born after the administrator's appointment, brings suit to quiet title to the estate owned by his ancestor, he cannot avail himself of the disability of infancy to stop the running of the statute of limitations, where it had begun to run against the administrator by reason of adverse possession of the land: *Jenkins v. Jenson*, 24 Utah, 108; 66 Pac. Rep. 773, 776, 778. Where purchasers at a void probate sale entered upon and claimed the property purchased by them, the heirs, and those claiming under them, are barred from maintaining any action to recover the same, unless it is commenced within three years next after the sale: *Meeks v. Vassault*, 3 Saw. 206; Fed. Cas., No. 9393. A statute which requires actions brought by the heirs of a deceased person for the recovery of real property descending to them, but sold by an administrator of the estate of the decedent upon an order of court directing such sale, to be commenced within five years after the time of the recording of the deed made in pursuance of the sale, applies to sales which are void for want of notice to the heirs of the proceedings upon which the deed is based: *O'Keefe v. Behrens*, 73 Kan. 469; 85 Pac. Rep. 555. There is no limitation upon the right of heirs, who are unknown, but who are citizens of the United States, to bring an action to recover either real or personal property, until the entry of a judgment in escheat proceedings brought by the state: *Estate of Miner*, 143 Cal. 194, 199; 76 Pac. Rep. 968. The heir is barred of his action when the executor is barred, although the heir or devisee may be laboring under a disability. The general rule is, that, when a trustee is barred by the statute of limitation, the cestui que trust is likewise barred, even though an infant. The heir or devisee is dependent upon the diligence of the executor for the maintenance of his rights, but is not without a remedy by an action for damages against his executor and his sureties, or by a proper proceeding to compel him to bring suit. Where the administrator neglects to bring an action to recover property of the estate until it is barred under the statute of limitations applicable to the subject, the heir is also barred, even though the heir be a minor at the time the action accrues to the administrator: *McLeran v. Benton*, 73 Cal. 329; 14 Pac. Rep. 879; 2 Am. St. Rep. 814; *Meeks v. Vassault*, 3 Saw. 206, 214; Fed. Cas., No. 9393; *Meeks v. Olpherts*, 100 U. S. 564. Where the purchaser at a probate sale had been in possession of the lands for a period of nineteen years prior to the commencement of an action by the heirs, and for more than fifteen years after the youngest heir became of age, and such possession had been open, notorious, and exclusive, the courts will not interfere in attempts to establish a stale trust, and the laches of the heirs where such circumstances exist, will preclude them from recovering the land: *Loomis v. Rosenthal*, 34 Or. 585; 57 Pac. Rep. 55.

6. Actions between heirs and devisees. Where a testator, prior to her death, placed a large amount of money in the hands of her son, to be invested and managed by him, and gave money to several of her other children for their own use, and the moneys thus given were evidenced by notes, and it appears that some interest had been paid thereon, but there is no evidence to the effect that those receiving the money should, at some time, and in some appropriate way, account therefor, it must be held, in an action between the heirs at law and devisees of the deceased (the real purpose of which is the settlement of accounts between the parties, growing out of moneys received by them from her), that the moneys so advanced to the other children were received by them as loans, and not as gifts. If one should therefore be credited with his or her distributive share of the assets, and be charged with the money or other property received, or money unaccounted for, as the case may be, the balances thus ascertained will exhibit the account between the parties: *Haines v. Christie*, 28 Col. 502; 66 Pac. Rep. 883, 884, 886, 887. In an accounting between the heirs and devisees of an estate to determine their distributive shares, moneys or property received by one of them from the estate, in the nature of advancements, are properly charged against his share, notwithstanding the statute of limitations may have run since the payments or advancements: *Goodnough v. Webber*, 75 Kan. 209; 88 Pac. Rep. 879, 881.

7. Right of heirs to attack sale of property.

(1) For want of jurisdiction. The superior court may vacate and set aside orders made by it in the course of its probate jurisdiction. Where the superior court is the successor of the probate court, under a former system of laws, it must be held to be the same court; and where the statute requires the appearance of minor heirs by guardian ad litem before the court shall make an order of sale, such appearance is necessary to give jurisdiction, even if the proceedings are in rem. A court must have jurisdiction both of the estate and of the persons of minor heirs to divest them of their title, where the statute expressly requires the minor heirs to be represented. They cannot waive this right, and the court cannot waive it by non-compliance with the statute. Hence an order of sale made without the appearance of the minor heirs is without authority of law, and is void as to them: *Ball v. Clothier*, 34 Wash. 299; 75 Pac. Rep. 1099, 1102, 1103. But where property has been sold by order of the court, without the appearance of minor heirs, but the land was purchased from the estate in good faith, and the purchase price thereof was paid into the estate and used in the administration thereof, and such heirs received the benefit, they should not be permitted to avoid the sale without repaying the purchase price: *Ball v. Clothier*, 34 Wash. 299; 75 Pac. Rep. 1099, 1104. A statute curing irregularities in

executors', administrators', or guardians' sales relates to irregularities, and does not go to the jurisdiction of the court. Such a statute cannot validate a sale which was void for want of jurisdiction: *Ball v. Clothier*, 34 Wash. 299; 75 Pac. Rep. 1099, 1103; *Dormitzer v. German Sav. & L. Soc.*, 23 Wash. 132, 192; 62 Pac. Rep. 862, 882. If the order of sale is void, the sale may be attacked collaterally by the heirs: *Townsend v. Tallant*, 33 Cal. 45, 54; 91 Am. Dec. 620. If the sale is void, it cannot be made valid and binding by a so-called confirmation; the sale being void, there is no subject-matter upon which the order of confirmation can act. If the court had no jurisdiction to order the sale, it has none to confirm it: *Townsend v. Tallant*, 33 Cal. 45, 54; 91 Am. Dec. 620. Where an administrator files his petition, and commences proceedings for the sale of real estate belonging to his intestate, all of the orders made in such matter are in one proceeding, and such proceeding consists of all orders and things done by the court, in such matter, from the filing of the petition to the confirmation of the sale and delivery of the deed. The heirs, in such cases, are pecuniarily interested in all such property, and are entitled to their day in court in all of the proceedings affecting the title to such property, and are adverse parties: *Reed v. Stewart (Ida.)*, 87 Pac. Rep. 1002.

(2) **For fraud.** An action in equity, by certain heirs of deceased, to obtain a decree adjudging the defendants to hold certain real property as trustees for plaintiffs, and for an accounting as to the rents and profits thereof, received by defendant, on the ground of the alleged fraud of defendants in procuring the title in the course of the administration of the estate of deceased, is not a collateral attack on the probate orders, but a direct attack thereon: *Campbell-Kawannanako v. Campbell (Cal.)*, 92 Pac. Rep. 184, 187. Heirs are entitled to equitable relief on the ground of extrinsic fraud, where the trustees of a void trust in a will, planned and carried into execution a scheme whereby a sale of decedent's property was made, and a nominal decree of distribution procured, where there was no necessity for any sale of the property, no intention to sell, no sale, and no proceeds of sale to be distributed or delivered to the trustees named as distributees in the purported decree, but which scheme was all a fraudulent imposition upon the jurisdiction of the superior court, an attempt, by concealing the real facts of the transaction from the court, to use that jurisdiction for the purpose of depriving plaintiffs, without consideration, of the property to which they had succeeded, and a mere cloak to cover what was in fact simply the bodily taking of plaintiff's property without consideration and without any authority of law: *Campbell-Kawannanako v. Campbell (Cal.)*, 92 Pac. Rep. 184, 186. A sale of real estate belonging to the estate of a deceased testator, made by an executor to the surety on his bond, under the

order of the probate court, procured through the fraud of the executor, may be set aside at the suit of a devisee, even though the surety was ignorant of the dishonest conduct of his principal: *Fincke v. Bundrick*, 72 Kan. 182; 83 Pac. Rep. 403. Relief may be granted in equity, on the application of defrauded heirs, from a sale of property of an estate to which they are entitled, where such sale was made in fraud of their rights, by the executrix, under a power in the will of their ancestor: *In re Johnson* (Cal. App.), 94 Pac. Rep. 592.

8. Estoppel of heirs. Although plaintiffs, who sue as heirs, and as grantees of another heir of an intestate, to recover certain real estate, may be precluded, by their conduct, from claiming a one-third interest in the property sued for, the complaint is still sufficient to support their claim as heirs at law of the said decedent for the other two thirds of the land described in it, unless plaintiffs are estopped by a decree of distribution, available on the face of the complaint: *Alcorn v. Brandeman*, 145 Cal. 62, 65; 78 Pac. Rep. 343. If a timber-culture claimant dies before performing the conditions precedent to obtaining title from the government, and administration is had, and the claim is sold by order of court, the heir is not estopped from asserting title to the claim, after the purchase at the administrator's sale, where it is not shown that he had actual knowledge of the sale, or that he induced the purchaser to make the purchase, although he may have acquiesced in the proceedings of the administrator. Where the owner of land that is offered for sale stands by, and, with knowledge of his title, encourages the sale, or does not forbid it, and thus another person, in ignorance of the true title, is induced to make the purchase under the supposition that the title offered is good, he is bound by the sale, and neither he nor his privies will be allowed to dispute the purchaser's title. But, to justify the application of this principle, it is indispensable that the party sought to be estopped should, by his conduct or gross negligence, encourage or influence the purchase, and that the other party, being at the time ignorant of the actual title, should have been misled by his acts and conduct, and induced thereby to change his position: *Haun v. Martin* (Or.), 86 Pac. Rep. 371, 373.

9. Liability of heirs.

(1) **In general.** The heirs are not bound to pay the debts or to discharge the obligations of the ancestor, unless they have received property from the estate, but if they have received assets, they are answerable for such debts and obligations only to the extent of their inheritance: *Bacon v. Thornton*, 16 Utah, 138; 51 Pac. Rep. 153. If a party seeks satisfaction for debts or obligations of the ancestor, from the heirs, the burden is upon him to show that they

inherited assets from the ancestor's estate: *Bacon v. Thornton*, 16 Utah, 138; 51 Pac. Rep. 153, 154. Although, by the common law of England, heirs are not bound by a covenant of warranty of their ancestors, unless expressly named therein, and then only to the extent of the assets received by descent, yet, in this state, when, after all the assets have been converted into money, and distributed to the heirs, an obligation of the ancestor matures, such heirs may be compelled to refund to the claimant so much of what they have received as shall be sufficient to satisfy the obligation: *Rohrbaugh v. Hamblin*, 57 Kan. 393; 46 Pac. Rep. 705 (reversing *Hamblin v. Rohrbaugh*, 3 Kan. App. 131; 42 Pac. Rep. 834). In any proceeding brought, either in the probate court or in equity, for the purpose of subjecting the land of an heir or devisee to the payment of a claim against the ancestor, such heir or devisee, or any person holding under them, may contest the legality or justness of such claim, and that, regardless of whether it has been duly allowed by the probate court as a claim against the estate: *Black v. Elliott*, 63 Kan. 211; 65 Pac. Rep. 215 (following *Bauserman v. Charlott*, 46 Kan. 480; 26 Pac. 1051, and *Kulp v. Kulp*, 51 Kan. 341; 32 Pac. Rep. 1118; 21 L. R. A. 550). If the creditor of an insolvent corporation brings an action against the widow and sole heir of a deceased stockholder of such corporation, to enforce a statutory liability, and to charge her as such heir, she is not a necessary party in her representative character as executrix: *Cooper v. Ives*, 62 Kan. 395; 63 Pac. Rep. 434, 436; and, in such a case, the action cannot be defeated by showing that there is sufficient personal property in another state, in the hands of the widow and executrix, for the payment of the creditor's claim: *Cooper v. Ives*, 62 Kan. 395; 63 Pac. Rep. 434, 436. An action in the nature of a creditor's bill cannot be maintained by a judgment creditor of an estate against an heir to enforce the judgment of the former against land which had descended to the latter: *Huneke v. Dold* (N. M.), 32 Pac. Rep. 45.

REFERENCES.

Liability of heirs for obligations of ancestor: See note 21 L. R. A. 89-84. Liability of heir or devisee for debt of ancestor: See note 112 Am. St. Rep. 1017-1027.

(2) **Limitation of liability.** A statute which simply declares a remedy which may be pursued upon a claim, upon the covenant or agreement of the ancestor, does not create a new and independent cause of action against heirs, but must be construed with and as supplementary to the general statutory provisions for the establishment of claims against estates. If the ancestor makes a covenant, which is broken when made, and subsequently dies, leaving a large estate over his debts and liabilities, which, in due course of adminis-

tration, is distributed among his heirs and legatees, after payment of all claims presented and allowed, and his executors are discharged, no claim having been presented or demand made on account of such broken contract, by reason of which the same is barred as a claim against the estate, and no facts appear to excuse such non-presentation, no action can be maintained thereon, under such a statute, against an heir by reason of his having succeeded to a portion of the real property of said estate: *Woods v. Ely*, 7 S. D. 471; 64 N. W. Rep. 531. The right of action against heirs to whom the ancestor's estate has been distributed under administration proceedings, to compel a refunding to one claiming damages for breach of a covenant of warranty occurring after such distribution, is not barred until five years after such breach: *Wood v. Cross*, 8 Kan. App. 42; 54 Pac. Rep. 12. Where a husband had acted as the agent of his wife, in the purchase of land with her separate funds, and had taken the deed in his own name, without her knowledge, and recorded the same, and afterwards died, an action to establish and enforce a resulting trust in her favor may be maintained by her against the heirs of the deceased husband, and the statute of limitations is not put in motion, in such a case, by the recording of the deed: *Hinze v. Hinze* (Kan.), 90 Pac. Rep. 762.

10. No allowance to heirs, of costs and expenses, from estate. An heir or legatee, who seeks the removal of an executor, has no power to deal with or to control the assets of the estate, and cannot make contracts which, in any way, will bind the estate. And the fact that the heir, who, as such, successfully prosecuted an action for the removal of an executor, afterwards became such administratrix, would not justify payment, out of the assets of the estate, of any item of cost and expenses incurred by her in the removal of such executor: *Estate of Bell*, 145 Cal. 646; 79 Pac. Rep. 358, 359. If heirs choose to bring suit to remove a cloud from title to their property, the expenses of such litigation are to be adjusted and paid by the parties to the action, and not by the estate of which the property forms a part. To hold otherwise would be to make an estate liable for expenses and costs which could not be controlled or measured by an administrator or executor, and invite confusion, if not absolute waste, in the settlement of estates: *Estate of Heeney*, 3 Cal. App. 548, 553; 86 Pac. Rep. 842. If two of the heirs of an intestate pay a debt, secured by mortgage on the family home, for the purpose of dispensing with the necessity of probate proceedings, which all of the heirs are seeking to avoid, and procure an assignment of the note and mortgage to their sister, and one of such heirs is subsequently appointed as administrator, he is not entitled to credit, in his account, as such administrator, for payment of the debt secured by such mortgage. The law does not contemplate that the claim of an admin-

istrator for reimbursement for moneys expended before his appointment can be established by his uncontradicted evidence, especially when such evidence, and the assignment presented as his voucher, show that, on the face of the record, the legal claim and right is in another, whose right has not been foreclosed: *Estate of Heeney*, 3 Cal. App. 548; 86 Pac. Rep. 842.

11. Purchasers from heirs.

(1) **In general.** A cause of action for a trespass or injury to land, occurring after the death of decedent, does not pass to the executor or administrator, but to the heir or devisee, or purchasers therefrom. To maintain an action to restrain waste, unless complainant is in actual possession, he must establish a valid and subsisting title in himself to the premises: *Adams v. Slattery* (Col.), 85 Pac. Rep. 87, 89. Where one entered upon land of an intestate, under a deed from persons who in fact had no title, but who are described therein as all of the intestate's heirs, and afterwards purchased the interest of a part of the true heirs, under circumstances tending to show a recognition of their ownership, the fact that he then made unsuccessful efforts, by advertisement in newspapers and otherwise, to ascertain whether there were any other heirs, is a circumstance from which a trial court is justified in finding that the possession of such occupant was not, at that time, adverse to the heirs who had not conveyed their interest to him, notwithstanding he was in complete control of the property, paying the taxes, making improvements, and collecting the income without accounting to any one: *Sparks v. Bodensick*, 72 Kan. 5; 82 Pac. Rep. 463. If an heir conveys his interest in the estate, or any part thereof, he conveys such interest only as will remain to him after satisfying the objects of administration, unless the deed should expressly cover more; and such objects of administration are: 1. To support the family for a period; 2. To set apart a homestead to the family; 3. To pay the expenses of administration; 4. To pay the debts of the deceased; 5. To distribute the balance of the estate to those who take it by law: *Estate of Moore*, 57 Cal. 437, 442. Where a foreign will has made disposition of real estate in this state, in a manner different from what the law would, a purchaser from an heir of the foreign testator, in order to be protected as against one claiming under such will, must show that he procured his title from such heir in good faith, and without knowledge of the existence of the will; but knowledge of the existence of such will may be acquired by other means than the evidence of a properly certified copy thereof, or a duly entered order of admission to record or probate: *Markley v. Kramer*, 66 Kan. 664; 72 Pac. Rep. 221. A person who acquires title to land of an estate from a devisee, pending administration, must be held to have the same right to have an action to quiet title thereto as is given by statute to his grantor:

Jordan v. Fay, 98 Cal. 264, 266; 33 Pac. Rep. 95. A judgment in ejectment, recovered by or against an administrator, is an estoppel in favor of or against the heir and those claiming under him; and such a judgment recovered by an administrator would inure to the benefit of those to whom the sole heir had conveyed prior to its recovery: *Spotts v. Hanley*, 85 Cal. 155, 167, 168; 24 Pac. Rep. 738. If an heir at law assigns his claim to an interest in an estate, the assignee has no right of action against the widow, who wrongfully took money of the deceased, his separate property, and deposited it in a bank, and afterwards claimed it as her own, where there has been no administration on the estate: *Galvin v. Mutual Sav. Bank*, 6 Cal. App. 402; 92 Pac. Rep. 322. If an heir conveys his interest in any part of the estate of his ancestor, pending administration, his conveyance is only of such interest as will remain to him after satisfying the objects of administration, unless his deed expressly covers more. And such conveyance does not preclude an application for a homestead from the land conveyed, as the setting apart of a homestead is one of the objects of administration: *Estate of Moore*, 57 Cal. 437, 442; *Phelan v. Smith*, 100 Cal. 158, 166; 34 Pac. Rep. 667.

REFERENCES.

Distribution to grantee of heir: See division III, head-line 12, subdivision 2, post. Validity of transactions between heir and ancestor relating to former's expectancy: See note 32 L. R. A. 595. Validity of sale of expectancy by a prospective heir: See note 33 L. R. A. 266-287.

(2) **Purchaser does not acquire what.** Where a testator devises a life estate in land, and on the termination of the life estate directs it to be sold for the benefit of parties named, who are all his heirs, and a title to the interest of one of such beneficiaries is vested, through foreclosure proceedings, in a party not otherwise connected with the original title before the termination of the life estate, the holder of the title acquired by such foreclosure cannot maintain suit for partition, after the termination of the life estate, against the remaining beneficiaries under the will, and the heirs of such beneficiaries, who died, in the absence of a showing that all parties interested have elected to take the land instead of its proceeds: *Bank of Ukiah v. Rice*, 143 Cal. 265, 274; 76 Pac. Rep. 1020; 101 Am. St. Rep. 118.

12. Mortgages by heirs and devisees, pending administration. A direction, in the will of a testator, that his estate be kept intact until the majority of his youngest son will not prevent a devisee under the will from making a valid mortgage of his interest before that time: *Dunn v. Schell*, 122 Cal. 626, 627; 52 Pac. Rep. 595. Where a devisee, who is also executrix, has borrowed money for the support

of the family, pending administration, and mortgaged her interest in the estate therefor, and subsequently procured an order for a probate sale of the same property for the alleged purpose of paying a family allowance, which included the sums so borrowed, a decree in equity, at the suit of the mortgagee, requiring the executrix to apply the proceeds of the probate sale to the payment of the sums due on his mortgage is proper: *Curtis v. Schell*, 129 Cal. 208, 220; 61 Pac. Rep. 951; 79 Am. St. Rep. 107.

13. **Contract relinquishing right as heir.** Whatever interest the wife acquires in the community property, or in the husband's separate property, she acquires as heir, and when she relinquishes her rights as heir she relinquishes her right to a part of the community property and to the subsequent acquisition of the separate property: *Estate of Warner*, 6 Cal. App. 361; 92 Pac. Rep. 191, 192. Where a woman, in an antenuptial contract, releases all her rights in the property of her intended husband, and as his heir, in consideration of his doing certain things, if he fails to perform material covenants on his part, she may show this, and still claim her rights as heir: *Estate of Warner*, 6 Cal. App. 361; 92 Pac. Rep. 191, 193. If an intended husband and wife make an antenuptial agreement that, in consideration of the wife's receiving from his estate, on his death, a certain sum of money, she will relinquish all claim to his property, she is entitled to such sum, not as an heir, but under the terms of the contract: *Estate of Warner*, 6 Cal. App. 361; 92 Pac. Rep. 191, 192. The superior court, when sitting in matters of probate, is the same as it is sitting in equity, in cases at law, or in a special proceeding; and when it has jurisdiction of the subject-matter of a case falling within either of these classes, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is necessary to a proper judgment in such case. Hence, where a widow's petition for letters of administration is contested on the ground that she was not entitled to succeed to any personal estate by reason of an antenuptial contract entered into by her and the deceased, and was not, therefore, entitled to letters, the superior court, sitting in probate, has jurisdiction to hear and determine an answer interposed by such widow, which alleges that the contract was procured by fraud; that it was entered into as the result of a mutual mistake; that the consideration was inadequate; that the contract was waived by the deceased; and that the decedent had failed to perform the same: *Estate of Warner* (Cal. App.), 92 Pac. Rep. 191, 192.

14. **Right of heirs to contest accounts.** Jurisdiction to determine conflicting interests. On the settlement of an account, the heirs have the right to question the allowance and approval of claims against an estate; but the presumption is in favor of the validity of the

allowance, and the burden of showing its invalidity is cast on the heirs: *Estate of Swain*, 67 Cal. 637, 642; 8 Pac. Rep. 497. Minor heirs are not estopped from questioning the correctness of the administrator's account by reason of proceedings in the probate court for the sale of real property to pay a claim alleged to be false: *Estate of Hill*, 67 Cal. 238, 244; 7 Pac. Rep. 664. If heirs, by reason of certain conditions surrounding the estate, have been induced to advance their money to the estate, to acquiesce in the final account without examination, and to withhold their claims against the estate, and have thus been deprived of their rights in regard thereto, which results in a fraud being perpetrated upon them, they are entitled to have the final account vacated and the estate reopened, in order that they may have an opportunity to present their claims against the same, and that such other proceedings as may be proper may be had in the administration of the estate: *Johnson v. Savage* (Or.), 91 Pac. Rep. 1082, 1083. The fact that an administrator has chosen to neglect for many years the final settlement of the estate does not estop the heirs from contesting his final account, nor preclude them from seeking to charge him with rents, issues, and profits: *Estate of Misamore*, 90 Cal. 169, 171; 27 Pac. Rep. 68. A decree settling the final account of an executor, reciting that he had paid and delivered all property of the estate to the persons entitled, and discharging him from his trust, is a bar to an action thereafter brought by a distributee to recover property alleged to have belonged to the estate, which he had refused to deliver: *Grady v. Porter*, 53 Cal. 681, 686. While probate courts have all the powers of a court of equity in the settlement of estates, the conflicting interests of heirs or lienors, no matter what their nature or origin, can only be determined in appropriate proceedings under proper pleadings: *Estate of Heeney*, 3 Cal. App. 548, 552; 86 Pac. Rep. 842.

REFERENCES.

Remedy of distributee as to accounting of which he had no notice, and on which he did not appear: See note 63 L. R. A. 95-108.

III. DISTRIBUTION.

1. **In general.** If all debts and charges against the estate, including the expenses of administration, have been paid, and there is in the hands of the executor and administrator an ascertained balance of assets subject to distribution, the estate is ready for distribution, and the distribution cannot be delayed. The court "must" then proceed to make distribution. The command of the law, under such circumstances, is peremptory: *Estate of Ricaud*, 57 Cal. 421, 422. But where there is not an ascertained balance of assets, real or personal, in the hands of the executor or administrator, or if the assets are merely claimed to exist, and the right to them is involved in litigation, either

by an action brought by the executor or administrator to recover them for the estate, or by an action against the executor or administrator to recover them from the estate, then the estate is not ready for distribution: *Estate of Ricaud*, 57 Cal. 421, 423. The "distribution" of an estate includes the determination of the persons who by law are entitled thereto, and also the "proportion or parts" to which each of these persons is entitled; and the "parts" of the estate so distributed may be segregated or undivided portions of the estate. A proceeding for distribution is in the nature of a proceeding in rem, the res being the estate which is in the hands of the executor under the control of the court, and which he brings before the court for the purpose of receiving directions as to its final distribution: *William Hill Co. v. Lawler*, 116 Cal. 359, 361, 362; 48 Pac. Rep. 323. The word "distributed" has reference to decrees of distribution in probate courts. It is not a technical word in conveyances, and is not usually found in deeds: *Estate of Heberle*, 35 Cal. Dec. 328, 329 (March 24, 1908). It cannot be contended that the petition for distribution is in one proceeding, and a settlement of accounts and decree of distribution in another, because of the fact that the clerk of the court filed the petition for distribution under a different number from the other papers in the estate, where all of the papers belong to the settlement of one and the same estate: *Estate of Sheid*, 129 Cal. 172, 176; 61 Pac. Rep. 920, 921. Unless exceptional circumstances prevent it, an estate in the territory of Hawaii should be closed in about eight months: *Estate of Espinda*, 9 Haw. 342, 344; *Estate of Kaiu*, 17 Haw. 514, 515. If an administrator receives his decedent's estate in the form of money, which is distributed, the estate is distributed "in kind," or in the form in which he received possession of it: *Estate of Davis* (Cal. App.), 97 Pac. Rep. 86, 89. A final decree of distribution, which describes land by a descriptive name, is sufficient, though it names two erroneous courses, apparent on their face, when applied to the land, for the reason that they do not answer the calls in the deed, as to following the boundaries of adjoining owners and the county road. Under such circumstances, the description being proved, without the erroneous courses, and the latter being apparent, they will be rejected as surplusage: *Bates v. Howard*, 105 Cal. 173; 38 Pac. Rep. 715, 718.

REFERENCES.

Distribution when domiciliary and ancillary administrators have been appointed: See note 9 L. R. A. 219.

2. *Petition for distribution.* A petition for distribution cannot regularly be filed until after the final account is settled. A statutory provision permitting a petition for distribution to be filed "with" the final account is probably intended to enable the administrator to

hasten the closing of the estate, and to make one notice and one hearing serve both purposes. But, whatever the reason may be, there is no authority for filing a petition for distribution at any time prior to the settlement of the final account, unless it is filed "with" it. If filed prior to that time, it is premature, and should be dismissed: *Estate of Sheid*, 122 Cal. 528, 531; 65 Pac. Rep. 328. A petition for final distribution should not contain a prayer for an accounting: *Estate of Cook*, 77 Cal. 220; 19 Pac. Rep. 431, 437. A legatee may file his petition for distribution to him at any time after the lapse of one year from the issuance of letters testamentary, and the fact that a supplement to the will has been filed and probated as a part thereof, after the issuance of such letters, does not deprive petitioner of this right: *Estate of Mayhew*, 4 Cal. App. 162; 87 Pac. Rep. 417, 419. It is proper to deny an application for the final distribution of an estate, which is not in a condition to be closed, and where no bond or security is given for the debts: *Estate of Washburn*, 148 Cal. 64, 67; 82 Pac. Rep. 671. It is the duty of the petitioner for a decree of distribution to inform the court as to all heirs of the estate entitled to share in the distribution thereof; but if he claims to be sole heir, and follows the statute in giving notice, etc., he is not guilty of a fraud upon the court in not stating the names of others who claimed to be heirs: *Royce v. Hampton*, 16 Nev. 25, 35. If a decree of distribution is not made upon the petition of the administrator, he is not bound to notify the court that there are other parties, besides the petitioner, who claim to be heirs of the estate: *Royce v. Hampton*, 16 Nev. 25, 34. It is proper to deny a petition asking for a distribution to a distributee of his distributive share of an estate if there is pending an application for the sale of real estate to raise funds necessary to pay charges and funeral expenses: *Estate of Koppikus*, 1 Cal. App. 88; 81 Pac. Rep. 733, 734.

3. Notice. A decree of final distribution may be made without personal notice, where the statute does not require such notice to be given of the application for final distribution: *Daly v. Pennie*, 86 Cal. 552, 554; 21 Am. St. Rep. 61; 25 Pac. Rep. 67. The statute does not require ten days' notice of the hearing of the final account and petition of an administrator for the distribution of an estate. It rests solely with the court to fix the day for hearing and the time of notice to be given; and where it was impossible to post the notice of the hearing for ten days, the court has power to settle the account and to render a decree of distribution, though only nine days intervened prior to the date set for the hearing: *Asher v. Yorba*, 125 Cal. 513, 516; 58 Pac. Rep. 137. But the notice required by the statute must, of course, be given; and, by giving such notice, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of

the estate: *William Hill Co. v. Lawler*, 116 Cal. 359, 362; 48 Pac. Rep. 323; *Crew v. Pratt*, 119 Cal. 139, 149; 51 Pac. Rep. 38; *Williams v. Marx*, 124 Cal. 22, 24; 56 Pac. Rep. 603; *More v. More*, 133 Cal. 489, 495; 65 Pac. Rep. 1044. If there is no evidence in the record on appeal that notice was not properly given, and the decree of distribution recites that "it appears by proper evidence that the notice, as prescribed by law, had been given of the hearing of said petition, and of the settlement of said final account," this is sufficient, and conclusive evidence of the fact that the necessary notice was given: *Estate of Sbarboro*, 70 Cal. 147; 11 Pac. Rep. 563, 564.

4. Limitations on distribution.

(1) **In general.** Whether distribution is sought as a separate proceeding, or on the settlement of the final account, provided a petition therefor has been filed with said account, the power to distribute can be exercised only after the final accounts of the administrator have been settled: *Smith v. Westerfield*, 88 Cal. 374, 379; 26 Pac. Rep. 206; *Estate of Sheid*, 129 Cal. 172; 61 Pac. Rep. 920. And the court cannot distribute property charged with a lien in favor of the administrator on account of money expended by him for the benefit of the estate: *Huston v. Becker*, 15 Wash. 586; 47 Pac. Rep. 10, 11. Nor can the court subject property distributed, to a lien for the administrator's compensation: *In re Sour's Estate*, 17 Wash. 675; 50 Pac. Rep. 587, 589.

(2) **Payment of taxes. Collateral-inheritance tax.** No distribution can be made until all taxes are paid. It will not be presumed that the taxes have been paid. It is the duty of the court to see that they are paid, and "taxes" include collateral-inheritance taxes: *Estate of Mahoney*, 133 Cal. 180, 184; 65 Pac. Rep. 389; *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1669; *Kerr's Cal. Cyc. Pol. Code*, § 3752. It is to be assumed that, before paying, or delivering to beneficiaries under the will any property given to them by the testator, the executors will deduct therefrom, or collect from the said beneficiaries, the amount of the collateral-inheritance tax upon their respective gifts: *Estate of Chesney*, 1 Cal. App. 30, 33; 81 Pac. Rep. 679. Where legacies amounting, in the aggregate, to fifteen thousand dollars, have been given by the will, and the legatees have received a portion of the money, an order directing the executors to pay the whole of said legacies as shown by the will, with legal interest, less the inheritance tax thereon, is indefinite in not designating the sum of money to be paid to each of the legatees; and the uncertainty is not removed by reference to the will in the decree, where the will does not appear in the record. It is the better practice to specify, in the order, the sum to be paid by the executor, and the amount of collateral-inheritance tax to be deducted therefrom: *Estate of Mitchell*, 121 Cal. 391;

53 Pac. Rep. 810, 811. As the court must be satisfied, before any decree of distribution of an estate is made, that any inheritance tax which is due and payable has been fully paid, it has power to direct the executor of an estate to deduct from legacies due the amount of a succession tax thereon, and to pay said sums so deducted to the county treasurer: *Estate of Martin* (Cal.), 94 Pac. Rep. 1053, 1055.

5. Delay of distribution. When the estate is not ready for distribution, the probate court has power, in the exercise of its judicial discretion, to delay its distribution until the right to the assets has been judicially determined, and the balance of assets for distribution has been ascertained: *Estate of Ricaud*, 57 Cal. 421, 423. The probate court has jurisdiction, as between the executor and those claiming the estate, to determine what belongs to the estate; but it does not have jurisdiction to determine the rights of those claiming adversely to the estate, and if serious questions upon such claims arise, the duty of the court might be to delay the final decree until such claims can be determined in another forum: *Estate of Burdick*, 112 Cal. 387, 391; 44 Pac. Rep. 734. The distribution of an estate need not be postponed to await a contest of the will: *Estate of Pritchett*, 51 Cal. 568, 570; 52 Cal. 94, 96.

6. Jurisdiction of courts. The superior court has full chancery jurisdiction, and also probate jurisdiction, and a special proceeding in rem has been prescribed to it, in which it is required to administer estates, whether testate or intestate. There is no occasion to determine whether, while sitting in probate, it is acting as a court of equity or not. The distribution of estates, and the determination of interests of distributees in the property distributed, are matters clearly within its amended jurisdiction, and such jurisdiction is exclusive: *Toland v. Earl*, 129 Cal. 148, 155; 79 Am. St. Rep. 100; 61 Pac. Rep. 914; *Estate of Freud*, 134 Cal. 333; 66 Pac. Rep. 476; *Silva v. Santos*, 138 Cal. 536, 541; 71 Pac. Rep. 703. The court should not assume to distribute property to those in whom it is already vested. All letters of administration are for purposes more or less temporary. The primary object is the collection of the assets and the payment of the debts of the decedent. The distribution of the residue among those thereto by law entitled is only an incident, and, when the primary object of the administration is non-existent, when all debts against the estate have been paid or barred, when the estate has become vested in those entitled thereto by law, and especially when thirteen years have been allowed to elapse after the death of the testator, no court should assume jurisdiction of the estate for the sole and only purpose of making a distribution thereof among those in whom the estate has already vested: *State v. Superior Court* (Wash.), 92 Pac. Rep. 942, 943. A probate court has no power, by an order of

distribution, to create a lien upon the interest of the heirs in the property distributed: *Huston v. Becker*, 15 Wash. 586; 47 Pac. Rep. 10, 11. Nor has it any authority to decree a distribution of real estate, subject to a lien for the fees of the administrator. This claim should be settled in the settlement of the estate, and the estate be distributed free from any lien therefor: *In re Sour's Estate*, 17 Wash. 675; 50 Pac. Rep. 587, 589. The court can do no more than to pay the claims against the estate, and to distribute the remainder among the heirs and devisees, or direct the administrator to do so. It has no power to appropriate the share of an heir or devisee to the payment of his debts. That would be to administer upon his estate before he is dead in law or in fact: *Estate of Nerac*, 35 Cal. 392, 397; 95 Am. Dec. 101. And a proceeding whereby the court directs that the distributed share of a non-resident heir at law shall be distributed among the other heirs, if the non-resident heir shall fail to appear and claim it within a year, is totally unauthorized: *Pyatt v. Brockman*, 6 Cal. 418, 419. A probate court has no jurisdiction to determine controversies between the estate in hand and adverse claimants, where there is no provision of law conferring such jurisdiction: *Guardianship of Breslin*, 135 Cal. 21, 22; 66 Pac. Rep. 962. The probate court has jurisdiction to determine who are the legal heirs of a deceased person who died intestate, and who are the legatees or devisees of one who died testate; but its determination of such matters does not create any new title: it merely declares the title which accrued under the law of descents, or under the provisions of the will: *Chever v. Ching Hong Poy*, 82 Cal. 68, 71; 22 Pac. Rep. 1081. On rendering ordinary decrees of distribution, probate courts deal only with issues and parties legitimately before them: *Chever v. Ching Hong Poy*, 82 Cal. 68, 72; 22 Pac. Rep. 1081. The jurisdiction is merely to determine the persons entitled under the will, or by succession, or their grantees: *More v. More*, 133 Cal. 489, 495; 65 Pac. Rep. 1044. In settling the accounts of an administrator the probate court has jurisdiction to determine the amount of money or property of the estate that has come into his hands and to charge him therewith. If he is improperly charged, his remedy is to appeal from the decree settling his final account: *Estate of Hall*, 36 Cal. Dec. 399, 403 (Nov. 13, 1908).

REFERENCES.

Loss of jurisdiction: See head-line 14, subd. 14, post.

7. Distribution with final accounting and settlement.

(1) **In general.** The matter of settling the final accounts of an executor or administrator does not necessarily involve the matter of distribution at all. Distribution of the estate to the heirs or legatees may take place upon the settlement of the final account, or at any subsequent time. One or the other of these is the usual course, though

the law allows, under certain conditions, a partial distribution before the settlement of the final account. Upon an order simply settling a final account, no matter concerning the distribution of the estate would be necessarily determined: *Estate of Thayer*, 1 Cal. App. 104, 106; 81 Pac. Rep. 658. In this state the distribution of estates has been made, to some extent, a matter distinct from the settlement of accounts. But it is clearly made so merely for convenience: *McAdoo v. Sayre*, 145 Cal. 344, 349; 78 Pac. Rep. 874. Upon the final settlement of the accounts of the executor or administrator, it is the peremptory command of the statute, without qualification, that the residue of the estate shall be distributed. The distribution is not to be postponed until after the time has elapsed within which the validity of the will may be contested, any more than until a minor heir shall have attained his majority, or an heir of unsound mind shall have recovered his reason: *Estate of Pritchett*, 51 Cal. 568, 570; 52 Cal. 94, 96. If the executor or administrator has a large amount of money on hand, and there is no reasonable probability of any further collections, and it appears from the record that there are no debts outstanding against the estate, and that all moneys due the estate have been collected, except two outstanding claims, the collection of which is improbable, the court should decree a final settlement and distribution: *Bellinger v. Ingalls*, 21 Or. 191; 27 Pac. Rep. 1038, 1039. The code authorizes a decree of distribution to be made at the same time that the final settlement is made: *Estate of Kennedy*, 129 Cal. 384, 386; 62 Pac. Rep. 64. The allowance of the final account of an executor or administrator is not a decree of distribution: *McCrea v. Haraszthy*, 51 Cal. 146, 151.

REFERENCES.

Petition for distribution cannot be properly filed prior to settlement of final account, but may be filed "with" it: See head-line 2, *ante*.

(2) **Waiver of settlement of account.** Ordinarily, the settlement of the final account must precede the distribution of the estate: *Estate of Sheid*, 122 Cal. 528, 531; 55 Pac. Rep. 328. But, where there is no real necessity for an accounting, this step preceding a distribution may be waived, as where the widow is the executrix and also the sole beneficiary under a will; where the entire estate has become vested in her, and she alone has the right to demand an accounting; and the accounting, when made, must have been made with her only, and for the purpose of settling the amount to which she, as sole distributee would be entitled. While an accounting in such a case might be convenient, there can be no doubt that she, the sole person interested, has the right to waive the rendition and settlement of such account, and to consent that the distribution may be without such

intermediate proceedings: *Middlecoff v. Superior Court*, 149 Cal. 94; 84 Pac. Rep. 764, 765.

(3) **Settlement of accounts. Notice.** It is not all accounts that must be settled before distribution. It is the settlement of the final account only which must precede the application for distribution. A statement of any receipts and disbursements of the executor or administrator, since the rendition of his final account, must be reported and filed at the time of such distribution, but this statement of receipts and disbursements is not the final account of the administrator. If all accounts or statements were required to be settled in advance of an application for distribution, it would, in most cases, result in preventing any distribution. Upon filing a petition for distribution, contests as to heirship may, and frequently do, arise, and months, and perhaps a year or more, may elapse before such contests are settled. In the mean time, receipts and expenditures go on, a statement of which should be furnished to the court before distribution is made, and the executor or administrator discharged. The statute allows these statements, submitted after the decree of distribution is applied for, to be settled at the time the decree is made, without notice, or the court may order notice to be given, and refer the same for settlement: *Estate of Sheid*, 129 Cal. 172, 175; 61 Pac. 920, 921. If the account be for a final settlement, accompanied by a petition for distribution, the notice must state those facts, and must be for at least the time prescribed by the statute: *Estate of Grant*, 131 Cal. 426, 429; 63 Pac. Rep. 731. The court acquires jurisdiction of parties interested in the estate to hear the application for a final accounting and settlement, and distribution, where the notice prescribed by the statute has been given: *Estate of Ryer*, 110 Cal. 556, 561; 42 Pac. Rep. 1082. An order made without the prescribed statutory notice is void. In such a case there can be no valid settlement of the account, and no valid order can be made for the payment of a claim: *Estate of Spanier*, 120 Cal. 698, 701; 53 Pac. Rep. 357. Whether additional notice shall be given or not is a matter within the discretion of the court below, and, in the absence of anything to show that such discretion has been abused, the appellate court will not interfere, where such further notice was not given: *Estate of Jessup*, 81 Cal. 408, 437; 6 L. R. A. 594; 21 Pac. Rep. 976; 22 Pac. Rep. 742, 1028.

(4) **Distribution subsequent to final settlement. Power of court.** Distribution may be made, also, at any time subsequent to the final settlement of the account; but, whenever made, the court has power to inquire into and to determine who are the heirs of the deceased, and who are entitled to receive the estate: *Smith v. Westerfield*, 88 Cal. 374, 380; 26 Pac. Rep. 206. The power to "distribute" an

estate on the settlement of the final account of an executor includes the power to determine to whom distribution shall be made: *Reformed etc. Church v. McMillan*, 31 Wash. 643; 72 Pac. Rep. 502, 503. It is the duty of the court upon final distribution to distribute all of the residue of the estate to the persons entitled thereto. The res over which the court acquires jurisdiction is not only the property described in the petition for distribution, but also the residue of the estate, and, notwithstanding the omission of the petition specifically to describe an undivided interest in a certain lot, the court has power to make a decree distributing not only the estate particularly described, but also "any other property not now known or discovered, which may belong to said estate, or in which said estate may have interest": *Humphrey v. Protestant Episcopal Church (Cal.)*, 97 Pac. Rep. 187, 188.

REFERENCES.

Power of court on distribution: See head-line 14, subd. 2, post.

8. What matters may be adjusted.

(1) **In general.** The only items which are properly to be settled in an executor's account are items relating purely to his administration of the estate; charges of administration and payment of debts of decedent; but, upon the hearing for distribution, the court, in harmony with its general equitable powers, can adjust all matters between the legatees and distributees and the executors, and credit the latter against the estate distributed to the former for all advances which may have been made to either of them under the terms of a will: *Estate of Willey*, 140 Cal. 238, 242; 73 Pac. Rep. 998. The decree of distribution has nothing to do with contracts or conveyances which may have been made by heirs, devisees, or legatees of or about their shares of the estate, either among themselves or with others; such matters are not before the probate court, and over them it has no jurisdiction. An heir may contract about or convey the title which the law cast upon him on the death of his ancestor; and the validity or force of such contract is not affected by the fact that a probate court afterward, by its decree of distribution, declared his asserted heirship and title to be valid: *Chever v. Ching Hong Poy*, 82 Cal. 68, 71; 22 Pac. Rep. 1080; *More v. More*, 133 Cal. 489, 495; 65 Pac. Rep. 1044. Jurisdiction of "matters of probate" includes the ascertainment and determination of the persons who succeed to the estate of a decedent, either as heir, devisee, or legatee, as well as the amount or proportion of the estate to which each is entitled, and also the construction or effect to be given to the language of a will, but does not include a determination of claims against the heir or devisee for his portion of the estate arising subsequent to the death of the administrator, whether such claim arises by virtue of his contract or in invitum; nor is the determination of conflicting

claims to the estate of an heir or devisee, or whether he has conveyed or assigned his share of the estate, a "matter of probate": *Martinovich v. Marsicano*, 137 Cal. 354, 356; 70 Pac. Rep. 459. If it were not for the California statute providing that "although some of the legitimate heirs, legatees, or devisees may have conveyed their share to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees" the only questions on distribution, in that state, would be as to who are the heirs, legatees, and devisees, and what property they are entitled to as such, and the court would be without authority to distribute to any person, other than heirs, legatees, or devisees. But, under such a statute, the court, on distribution, may determine disputes between heirs, legatees, or devisees, and persons claiming to be the grantees of their shares under conveyances made by them: *Estate of Ryder*, 141 Cal. 366, 369; 74 Pac. Rep. 993. See also, head-line 10, post. Where a wife, supposing her husband to be dead, married a second time, and her claim of widowhood was litigated upon issues joined as to her rights to family allowance and to a probate homestead, which issues were determined against her, such determination is *res judicata*, and she is estopped from claiming widowhood upon distribution of the estate: *Estate of Harrington*, 147 Cal. 124, 128; 109 Am. St. Rep. 18; 81 Pac. Rep. 546. An antenuptial contract affecting the personal property of a deceased person should be proved, and the rights of the parties thereunder determined before the county court, which has exclusive jurisdiction over the distribution of the personal property of deceased persons: *Winkle v. Winkle*, 8 Or. 193, 196. The question of title cannot be determined in a proceeding for the distribution of a decedent's estate: *Estate of Rowland*, 74 Cal. 523, 526; 5 Am. St. Rep. 464; 16 Pac. Rep. 315. Whether application for distribution is made as an independent proceeding, or in connection with the final account, the equitable claims of parties against the heirs or assignees of heirs is not a proper subject for the consideration of the court: *More v. More*, 133 Cal. 489, 495; 65 Pac. Rep. 1044. On final distribution of a deceased wife's estate, a surviving husband is not entitled to have property held by her executor declared to be community property to which he is entitled, because his claim is not as heir or devisee, but is adverse to the estate, and, as such, will be no more concluded by the decree of distribution than would the claim of a third party who claimed adversely to the decedent: *In re Rowland*, 74 Cal. 523, 525, 526; 16 Pac. Rep. 315; 5 Am. St. Rep. 464.

(2) **Question of heirship.** The purpose of a statute which provides that the court may ascertain and declare the rights of all persons to an estate and all interests therein, and to whom distribution thereof shall be made, is to expedite the distribution of estates by enabling persons

claiming interests therein to have their claims determined in advance of the application for distribution: *In re Oxarart*, 78 Cal. 109, 111; 20 Pac. Rep. 367. The purpose of the proceeding is to determine the parties to whom the estate is to be distributed. It is therefore subsidiary to the proceeding for distribution, and the jurisdiction of the court in the two cases is coextensive: *More v. More*, 133 Cal. 489, 495; 65 Pac. Rep. 1044. The pendency of proceedings to determine heirship does not exclude the usual proceeding for the determination of that question at the hearing of the application for distribution. When, in advance of any determination of the court of the questions involved in a proceeding to determine heirship, an application is made for distribution, there is no reason why the court should not hear the latter application, determine all questions of heirship, and dismiss the other proceeding: *In re Oxarart*, 78 Cal. 109, 111; 20 Pac. Rep. 367; *Estate of Sheid*, 129 Cal. 172, 176; 61 Pac. Rep. 920. If the petition for distribution has been filed at the proper time, all the questions made thereunder to determine heirship and title to the estate may be properly determined under it: *Estate of Sheid*, 122 Cal. 528, 532; 55 Pac. Rep. 328. It is clearly the purpose of the California statute relating to determination of heirship to provide the means by which, where there are hostile claimants to an estate, all the conflicting rights thereto may be summarily and finally determined in one proceeding: *Estate of Burton*, 93 Cal. 459; 29 Pac. Rep. 36; *Blythe v. Ayres*, 102 Cal. 254, 258; 36 Pac. Rep. 522.

9. Consideration of will. Where a trust has been created by will, the validity of the trust is necessarily involved in the question of distribution; for, if invalid, the bequest fails. Hence, if necessary to distribution, it is within the province of the probate court to define the rights of all who have, legally or equitably, any interest in the property of the estate, derived from the will: *More v. More*, 133 Cal. 489, 495; 65 Pac. Rep. 1044. For the purpose of enabling the court to distribute the estate of a testator in accordance with his will, it is required to consider the will, as well as the estate left by him, and to construe its terms for the purpose of determining his intention, and make its order or decree of distribution in accordance with such construction. But, as in the case of a judicial determination of any instrument, the will is but evidence upon which the court acts in rendering its judgment. The judgment is the final determination of the rights of the parties to the proceeding, and upon its entry their rights are thereafter to be measured by the terms of the judgment, and not by the will. A will can no more be used as evidence to impeach the decree of distribution, than can any other evidence upon which a judgment is rendered: *Goad v. Montgomery*, 119 Cal. 552, 557; 51 Pac. Rep. 681; *In re Treacony*, 119 Cal. 568, 570; 51 Pac. Rep. 951. Where it has been attempted to create a trust by will, and there has been a decree of

distribution, the rights of the parties are to be ascertained from the decree of distribution and not from the will. Such decree is the final and conclusive adjudication of the testamentary disposition made by the decedent. The decree supersedes the will and prevails over any provision therein which may be thought inconsistent with the decree: *Keating v. Smith* (Cal.), 97 Pac. Rep. 300, 302. In California, no independent action in equity lies to construe a will, whether it involves merely legal questions or the regulation of trusts created by the will. Such jurisdiction is vested exclusively in the probate court. Under the probate system of that state, all deraignment of the title of the property of deceased persons is through the decree of distribution, entered after a final account in the administration of an estate, whether testate or intestate, and this decree cannot be made by any other court, or in any other proceeding. The probate court not only may, but should, and often must, construe the trusts created by the will. After the decree is made, the will practically drops out of existence. The law of the estate is the decree, and not the will, and all deraignments of title are through the decree: *Toland v. Earl*, 129 Cal. 148, 152; 79 Am. St. Rep. 100; 61 Pac. Rep. 914. Upon distribution, questions may arise affecting the rights of beneficiaries, to whom payment has previously been made by the executor, to take at all under the will; and questions of the invalidity of general or partial trust provisions, lapsed legacies, excessive charitable bequests, omitted heirs, etc., are questions which may affect the entire or partial disposition under the will. It must be apparent, that, as these matters which may so radically affect the rights of the beneficiaries under any will can only be legally and effectively determined upon distribution, any effort to have them determined in settling accounts must, in the nature of things, be out of place. If an executor undertakes to construe the provisions of a will, or to make payment thereunder in anticipation of the decree of distribution, he does so at his peril, and cannot, in an account, call upon the court, in advance of a distribution, to construe the provisions of the will, or determine the rights of the legatees, for the purpose of ascertaining whether the opinion of the court conforms to the judgment of the executor: *Estate of Willey*, 140 Cal. 238, 242; 73 Pac. Rep. 998. After the probate court has distributed lands which belong to an estate, in the due course of administration, it has no further control of the same, in the exercise of its probate jurisdiction; and the circumstance that at a future time there is to be a division of the property among remaindermen, beneficiaries of the trust in a will, does not affect the rule: *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 594; 40 Pac. Rep. 810. Where it is within the privilege of the widow to elect to take in accordance with the will, rather than to claim her right as surviving widow to the one half of the estate, it will be assumed, for the purpose of sustaining the decree of distribution, that she made such election, or that she could have presented

her claim for the undivided half of the estate, but failed to do so: *Cunha v. Hughes*, 122 Cal. 111, 113; 54 Pac. Rep. 535. A decree of final distribution is necessarily a judicial construction of the will, and of the several interests of the distributees, and cannot be attacked collaterally: *Williams v. Marx*, 124 Cal. 22, 24; 56 Pac. Rep. 603; *McKenzie v. Budd*, 125 Cal. 600, 602; 58 Pac. Rep. 199; *Martinovich v. Marsicano*, 137 Cal. 354, 359; 70 Pac. Rep. 459. The court, in determining whether the amount of personal property in the hands of executors is sufficient for the immediate payment of petitioner's legacy, is not required to take into consideration the amount that may be required for erecting tombstones authorized by the will. If the moneys in the hands of the executors, after making other payments, shall be insufficient therefor, they can resort to the realty: *Estate of Chesney*, 1 Cal. App. 30; 81 Pac. Rep. 679, 680.

10. Objections to distribution. The fact that a proceeding is pending for the adjudication of heirship is not a good ground for the continuance of a petition for the distribution of the estate, as the question of heirship may be determined on the hearing of the petition for distribution: *In re Oxarart*, 78 Cal. 109, 112; 20 Pac. Rep. 367. One who has no interest in the estate has no right to object to its distribution: *Estate of Walker*, 148 Cal. 162; 82 Pac. Rep. 770, 771. An objector has no independent right to complain of a distribution, in full accord with the terms of a will, the probate of which has not been revoked, and which is unassailable, either by proceedings to revoke the probate, or in an equitable action to have the distributees thereunder decreed to be trustees for him: *Tracy v. Muir*, 151 Cal. 363; 90 Pac. Rep. 832, 833. Assignments of error based upon objections to the jurisdiction of the court to decree a final distribution, for the reason that there is litigation pending, involving property belonging to the estate, cannot be sustained, where the record shows that whatever litigation there had been concerning the estate has been finally determined: *Drasdo v. Jobst*, 39 Wash. 425; 81 Pac. Rep. 857, 858. The sureties of the administrator cannot, in an action by a distributee to recover the sum distributed to him, be heard to question the validity of the decree, where notice was given as required by statute: *McClellan v. Downey*, 63 Cal. 520, 523. The opinions of the supreme court of California are not entirely harmonious as to the authority of the court, on distribution, to determine, against the objection of an heir, legatee, or devisee, as to the rights of a third person claiming under a conveyance alleged to have been made by such devisee, legatee, or heir. It may, however, be conceded, that, under the provisions of section 1678 of the Code of Civil Procedure of that state, the court, on distribution, may determine disputes between heirs, legatees, and devisees and persons claiming to be the grantees of their shares under conveyances made by them, although the determination of such disputes would not ordinarily be

within the functions of the probate court. If such authority exists, however, it rests solely upon the provision of that section, and is limited by its terms. But that section includes only conveyances of their shares made by "heirs, legatees, or devisees," and has no reference to conveyances made prior to the death of the deceased, by persons who were not, at the time of the conveyance, either heirs, legatees, or devisees, and who then had no interest in the property that was capable of being conveyed: *Estate of Ryder*, 141 Cal. 366, 369; 74 Pac. Rep. 993. If the distributee of an estate has assigned his share, and such assignment has been recognized by the court, and is not disputed by the assignor, neither the administrator nor others can object to distribution made to such assignee, or that such share shall be paid to the assignee: *Estate of Davis*, 27 Mont. 490; 71 Pac. Rep. 757, 760. The validity of disputed assignments of a distributive share, or legacy, or devise, cannot be tried or determined by a court sitting in a probate proceeding. This is a collateral question; but when there is no dispute, as where the party entitled gives his consent, there is no reason, on principle, why the court may not recognize and give it effect: *In re Davis' Estate*, 27 Mont. 490; 71 Pac. Rep. 757, 759. Where a person, at the time of his death, has no interest in property, having conveyed the same during his lifetime, his heirs have no interest in the estate, and have no right to object to a distribution thereof to the grantee: *Estate of Conroy* (Cal. App.), 93 Pac. Rep. 205, 206.

11. Kinds of property. If the widow dies, pending administration of her husband's estate, there seems to be no objection to the distribution of her share of the estate to her heirs, as being the persons entitled thereto, if the creditors do not object. It would, perhaps, be more orderly to have her interest in the estate distributed in terms, in administration of her estate, to her heirs, and that such heirs go with the decree to have distribution in the husband's estate; or, to have distribution, if personal property, to her administrator for the purposes of administration; but such course would not materially change the relation of the parties, where it appears that her estate was administered upon and that she left no heirs other than those mentioned in the decree: *McClellan v. Downey*, 63 Cal. 520, 524. The homestead right attaches in favor of the widow and children, if the estate is insolvent, or below the homestead limit in value; but where the estate is solvent and above the homestead allowance in value, such part of the homestead as may be set aside to the widow must be deducted from her distributive share of the real estate falling to her under the statute: *In re Little*, 22 Utah, 204; 61 Pac. Rep. 899, 901. In adjusting the respective shares of heirs and devisees, if it appears that the homestead was conveyed to an heir in pursuance of an arrangement between the heirs and devisees, the value which such heir received by reason of the conveyance should be charged against such heir, and the others

be given their pro rata share: *Haines v. Christie*, 28 Cal. 502; 66 Pac. Rep. 883, 887. If a foreigner dies in this state, leaving property here, and children, the former must, in the absence of an antenuptial contract, be distributed in the manner required by the statute of the state: *Estate of Baubichon*, 49 Cal. 18, 28. It is the place of the actual domicile of the person at the time of his death which determines the distribution of his personal estate; hence, where a testator died in Europe, and it is found as a fact that the domicile at the time of his death was in the state of Nevada, and that he left property in the state of California, the probate court of the latter state should decree distribution of the personal assets of the estate of the decedent according to the law of the state of Nevada: *Estate of Apple*, 66 Cal. 432, 441; 6 Pac. Rep. 7. Where money has been distributed to a non-resident minor heir at law of the intestate, who does not appear, and who does not claim it, the money should be paid into the state treasury, where it must remain until claimed by the owner, or, in case of his death, by his representatives: *Pyatt v. Brockman*, 6 Cal. 418.

REFERENCES.

Law governing distribution of fund collected or recovered for the negligent killing of a person: See note 4 L. R. A. (N. S.) 814, 815. Distribution of community property on death of wife: See § 32, ante. Distribution of common property on death of the husband: See § 33, ante.

12. Distributees.

(1) *In general.* The only persons whose claims to distribution can be considered are those who claim directly from the deceased, as heirs, devisees, or legatees, and those who claim as their assignees, under conveyance made by them subsequent to the death of the deceased: *Estate of Ryder*, 141 Cal. 366, 371; 74 Pac. Rep. 993. A trustee takes only such estate as is necessary for the performance of the trust, and a decree which distributes the trust property to the trustee "for the period, and for the use, trust, and purpose hereinafter in this decree specified," is proper; and this gives to the trustee only an estate for years: *Estate of Reith*, 144 Cal. 314, 320; 77 Pac. Rep. 942. A decree of distribution should dispose of the property, and the whole title thereto, and of all the estates therein. So where, by a will, the title in fee is vested in several children, subject to a trust and to the possession of the property by the trustee during the trust period, such title in fee, subject to said trust, should be distributed to the children: *Estate of Reith*, 144 Cal. 314, 320; 77 Pac. Rep. 942. Where the whole title to property passed from the testatrix by the will, and the title in fee vests in the children at the death of the testatrix by virtue of a direct testamentary gift to them, subject only to trusts, it is erroneous to decree that the property would go to her heirs upon the death of one of the children before arriving at the age mentioned in the will. In the event of the death of one of said children, his or her share in the

property would vest in fee in his or her heirs: *Estate of Reith*, 144 Cal. 314, 321; 77 Pac. Rep. 942. There is no law or practice, however, which requires the courts, in making distribution of an estate, to determine by its decree whether an alleged mortgage upon the interest of an heir is valid, or that the debt has not been paid, or whether there is not some defense to it. An estate should not be distributed to a mortgagee, but he has a right to be heard in the matter of the distribution, where he has an interest which may be affected by the decree. But no intervention should be allowed on his part unless sustained by some pleading or statement of the grounds upon which he claims the right to be heard: *Estate of Crooks*, 125 Cal. 459, 461; 58 Pac. Rep. 89. The court has jurisdiction to distribute only the estate of which the decedent was possessed at the time of his death, and it is only a claim against that estate, or some portion of it, for which it can make provision in its decree. There is no provision authorizing the court to assign a share of the estate to a person who holds a mortgage or judgment lien, or other encumbrance thereon, made or suffered by the heir, subsequent to the death of the ancestor. A judgment creditor of the heir, therefore, is not entitled to receive any portion of the estate, and the court could not, upon distribution, assign to him any share thereof. A statute, making the order or decree of distribution conclusive, does not include the judgment creditor, and his lien is no more affected by the order of distribution than would be a lien upon the property of the heir created prior to the death of the decedent. The owner of a judgment lien is not required to appear in court, or to present his lien at the time of distribution, at the peril of having the land distributed free from his lien: *Martinovich v. Marsicano*, 137 Cal. 354, 357, 358; 70 Pac. Rep. 459. Where a deceased widow's estate is entitled to one half of the community property, and one fourth of the remainder devised by her husband's will, it is error for the court to distribute to such estate only one fourth of the whole: *Estate of Wickersham*, 138 Cal. 355, 363; 70 Pac. Rep. 1076. A suit by persons interested in an estate to determine their distributive shares therein is not a condition precedent to an order of distribution, where all parties interested have agreed as to the share each is to receive, and a decree has been entered in pursuance of such agreement: *In re Day's Estate*, 27 Mont. 490; 71 Pac. Rep. 757, 760. Ordinarily, a legatee or devisee, or an heir, is entitled, as a matter of right, to receive his share of the estate at the time fixed by the statute, if the same can be given to him without loss to creditors, regardless of the fact that it might be better for all interested in the estate that the property should be held in administration for a longer period: *Estate of Glenn (Cal.)*, 94 Pac. Rep. 230, 231.

REFERENCES.

Conflict of laws as to legitimacy of distributee: See note 65 L. R. A. 178-182. Binding effect of settlement, by sole heir or distributee, of claim belonging to estate, upon administrator: See note 11 L. R. A.

(N. S.) 148-151. Settlement by sole distributee of claim in favor of the deceased, binding effect of an administrator: See note 10 Am. & Eng. Ann. Cas. 555.

(2) **Assignees. Shares "conveyed." Grantee.** If it were not for a statute providing that, "although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, such shares must be assigned to the person holding the same, in the same manner as they would have been to such heirs, legatees, or devisees," the only questions on distribution would be as to who are the heirs, legatees, or devisees, and what property they are entitled to as such, for the court would then be without authority to distribute to any persons other than heirs, legatees, or devisees, where such statute is the only provision of law that authorizes distribution to any other person: *Estate of Ryder*, 141 Cal. 366, 369; 74 Pac. Rep. 993. Under such a statute, the court is authorized to assign the share of an original heir or devisee to another only when such heir or devisee has "conveyed" his share to such other person; and the provision in such a statute, that such share must be assigned to the person holding the same in the same manner as they otherwise would have been to such heirs, legatees, or devisees, instead of implying that the distributee takes the share distributed, discharged of any mortgage, or judgment lien thereon, made or suffered by the heir or devisee in favor of third persons, clearly indicates that he takes it subject to such lien or encumbrance: *Martinovich v. Marsicano*, 137 Cal. 354, 357; 70 Pac. Rep. 459. The only section of the code of California authorizing distribution to the grantee of an heir, or a devisee, is section 1678 of the Code of Civil Procedure of that state, and this does not justify the court in distributing the estate of a deceased person to the mortgagee of an heir or devisee or to an assignee as security, who is not a grantee of the heir or devisee. If the devisee has mortgaged his interest, the court, at most, can only distribute to such devisee, subject to the mortgage: *Estate of Crooks*, 125 Cal. 459, 461; 58 Pac. Rep. 89. There is no provision in the code authorizing the court to assign a share of the estate to a person who holds a mortgage or judgment lien or other encumbrance thereon made or suffered by the heirs subsequent to the death of the ancestor. A judgment creditor of the heir, therefore, is not entitled to receive any portion of the estate, and the court cannot, upon distribution, assign to him any share thereof: *Martinovich v. Marsicano*, 137 Cal. 354, 357; 70 Pac. Rep. 459. Upon petition for final distribution, the petitioner, where he has acquired all the interest of the heirs of the decedent to the decedent's estate, is entitled to have the property distributed to him, and it is error for the court to distribute to the heirs of the decedent, upon the hearing of such petition, if not contested by them: *Estate of Vaughn*, 92 Cal. 192, 194; 28 Pac. Rep. 221. If a legatee assigns his legacy as security, a bona fide

assignee thereof is entitled on distribution to the amount due him: *Estate of Phillips*, 71 Cal. 285; 12 Pac. Rep. 169. But, in Oregon, the assignee of an heir or legatee is a stranger in the probate proceedings in an estate, and cannot have an order distributing to him the share of his assignor: *Harrington v. La Rocque*, 13 Or. 344. A power of attorney to receive the distributive share of an heir in an estate, although irrevocable, is not a conveyance of such share; and if the holder of such a power fails to appear on final distribution, and allows such share to be distributed to the heir, he cannot enjoin a creditor of the heir in an attempt to apply the property in payment of his debt: *Freeman v. Rahm*, 58 Cal. 111, 115. Property may properly be distributed to a distributee's assignee: *Estate of Conroy*, 6 Cal. App. 741; 93 Pac. Rep. 205, 206. The assignee of the assignee of a distributee's interest in an estate is entitled on distribution to have such distributive share set apart to him notwithstanding the pendency of a suit against the original assignee, brought a few days before the hearing for distribution to have the assignment set aside, but in which suit there had been no service, or appearance entered, before said hearing: *Estate of Phillips*, 71 Cal. 285; 12 Pac. Rep. 169, 171. If a testator devises real property to his widow and a son, the interest devised to the widow vests in her immediately upon the death of the testator, subject only to the right of administration; and, upon the docketing of a judgment rendered against her, pending the administration, it becomes a lien upon her interest in the real estate so devised, which continues for the time prescribed by statute; and her assignment of her interest to the son subsequent to the rendition of the judgment against her, and the distribution of the estate to the latter, does not affect the rights of the holder of the judgment lien. The court is not authorized to make distribution of real estate to others than the heirs, legatees, or devisees, except in cases where the heir or devisee has "conveyed" his share to some other person. The judgment creditor, therefore, is not entitled to receive any portion of the estate, and the court could not, upon distribution, assign him any share thereof. But he is not required to appear in court and present his claim at the time of the distribution, at the peril of having the land distributed freed from his lien, and he does not forfeit his lien by reason of his failure to so present his claim: *Martinovich v. Marsicano*, 137 Cal. 354, 357; 70 Pac. Rep. 459.

(3) **Retention of distributee's share for debt.** A probate court, having jurisdiction to make a settlement and distribution of a decedent's estate, may determine the share of each distributee, and, to that end, can inquire into and determine the indebtedness of the distributee to the estate, and order a deduction of the same from his share: *Holden v. Spier*, 65 Kan. 412; 70 Pac. Rep. 248. The equitable right to retain the debt of a distributee from his distributive share is

not affected by the lapse of time, and the deduction of the debt should be made, although an action to recover the same would be barred by the statute of limitations: *Holden v. Spier*, 65 Kan. 412; 70 Pac. Rep. 348, 350.

REFERENCES.

Deduction of debt from distributee's share: See head-line 14, subd. 2, post.

(4) **Right of action to recover property.** An action may be brought against a surviving executor of the will of a deceased person to recover a sum of money due to a trustee for certain beneficiaries, under the terms of the decree of distribution of the estate: *Le Mesnager v. Variel*, 144 Cal. 463, 464; 77 Pac. Rep. 988. All the distribution amounts to, in any case, is a conveyance from the deceased to the distributee, who manifestly gets no better title than the deceased had, and the title of the deceased not having been traced to the government, a grantor's possession, or to a common source of title, no title is shown in the distributee. The distribution of an estate that has escheated does not convey a warranted title, any more than the distribution of any other estate, and does not entitle the distributee, having no title, to maintain an action of ejectment: *Helm v. Johnson*, 40 Wash. 420; 82 Pac. Rep. 402, 403. In an action by a distributee to recover the sum distributed to him, the surety of the administrator, after proper notice given, is bound by the decree of distribution and cannot be heard to question its validity: *McClellan v. Downey*, 63 Cal. 520, 523.

REFERENCES.

Enforcement of decree, contempt, and execution: See head-line 14, subd. 12, post. Action to recover estate: See head-line 14, subd. 15, post.

13. Distribution to non-residents. While each state will deal with the property of a decedent within its jurisdiction, so far as creditors are concerned, according to its pleasure, the universal rule is, that distribution of the decedent's personal estate must be governed by the law of his actual domicile at the time of his death: *Estate of Apple*, 66 Cal. 432, 434; 6 Pac. Rep. 7; *Whitney v. Dodge*, 105 Cal. 192, 198; 38 Pac. Rep. 636. All the authorities agree that the residuum of the foreign assets must finally be collected and distributed by the domiciliary executor: *Estate of Ortiz*, 86 Cal. 306, 316; 24 Pac. Rep. 1034; *Joy v. Elton*, 9 N. D. 448, 457; 83 N. W. Rep. 875; and see note to 45 Am. St. Rep. 668, 670. "There is no reason why the courts of a state other than the domicile of a decedent could not, after the payment of costs and debts, administer and distribute the personal estate within their jurisdiction according to the laws of the state of such domicile. Indeed, in the exercise of a proper dis-

cretion, this would, under some circumstances, be a duty required of them. 'As a general rule assets remaining in the hands of an ancillary representative, after paying the claims of local creditors, will be transferred to the place of the domicile for distribution. This rule, however, is not absolute or inflexible, but, on the contrary, the transfer will or will not be made as the court may deem proper in the exercise of a sound judicial discretion according to the circumstances of the case. The court may, in its discretion, order that the residue of the assets remaining in the hands of an ancillary representative, after paying the claims of local creditors, be retained and distributed by him, instead of being transmitted to the principal representative; and, in a number of cases, it has been held that, under the circumstances of the particular case, a retention of the assets was proper. But since the distribution of and succession to personal property, wherever situated, is governed by the laws of the state or country where the owner had his domicile at the time of his death, the distribution, when made by the ancillary representative, must be according to the law of the domicile': *Rader v. Stubblefield*, 43 Wash. 334; 86 Pac. Rep. 560, 565.

14. Decree.

(1) **In general.** A decree of distribution is not a judgment or order directing the payment of money, nor does it direct the assignment or delivery of documents or personal property. It is an adjudication as to rights only. It is simply evidence of title, and not a judgment that the heir or legatee recover money or other property from another: *Estate of Kennedy*, 129 Cal. 384, 387; 62 Pac. Rep. 64. The decree of distribution must name the persons entitled under the will, or by succession, or their grantees: *Martinovich v. Marsicano*, 137 Cal. 354, 358; 70 Pac. Rep. 459; *Estate of Crooks*, 125 Cal. 459, 461; 58 Pac. Rep. 89. A decree of distribution must simply name the persons and the proportion or parts to which each is entitled: *Estate of Kennedy*, 129 Cal. 384, 387; 62 Pac. Rep. 64. Orders made relative to the distribution of estates are properly made in accordance with the statutes in force at the time: *In re Thorn's Estate*, 24 Utah, 209; 67 Pac. Rep. 22, 23. The ordinary and usual way in which the title of the ancestor descends to the heir, in such a shape as to make it available to him, is by a decree of distribution. The intervention of the probate court, and an adjudication and distribution thereunder, are essential to the passing of the title of the ancestor to the heir, so perfected as to make it beneficial to him: *Balch v. Smith*, 4 Wash. 497; 30 Pac. Rep. 648, 650. A trustee takes only such estate as is necessary for the performance of the trust; and the decree properly distributes the trust property to the trustees "for the uses, trusts, and purposes, hereinafter in this decree specified." But a decree of distribution should dispose of the property, and the whole title thereto,

and all the estates therein. If, by a will in question, the title in fee is vested in certain children, subject to a trust, and to the possession of the property by the trustees during the trust period, such title in fee, subject to said trust, should be distributed to the children: *Estate of Reith*, 144 Cal. 314; 77 Pac. Rep. 942, 944. A decree of distribution has, in most respects, all the efficacy of a judgment in law, or a decree in equity: *Melone v. Davis*, 67 Cal. 279, 281; 7 Pac. Rep. 703. Before the court allows to a legatee a portion of his legacy under the statute, it is its duty to protect the executor or administrator, so that he shall receive his commissions upon the "amount of his estate accounted for by him." But such protection can be afforded without depriving the court of its discretion to make an order for the payment of a legacy, although the actual money in the hands of the administrator or executor may be no more than the amount of his commissions: *Estate of Dunn*, 65 Cal. 378, 381; 4 Pac. Rep. 379. A decree of distribution is not void for want of description, if, under the test of the application of the ordinary rules of evidence to the subject, it can be readily shown to represent a specific and certain piece of land: *Smith v. Biscailuz*, 83 Cal. 344, 361; 21 Pac. Rep. 15; 23 Pac. Rep. 314. See *De Sepulveda v. Baugh*, 74 Cal. 468. If the probate court has ordered property to be sold to pay the debts and expenses of administration, it is improper to decree a distribution of such property: *Estate of Freud*, 134 Cal. 333, 337; 66 Pac. Rep. 476.

(2) **Power of court.** A court has no jurisdiction to make distribution where the petition for final distribution was not filed with the final account, but was filed afterwards and before the final account was settled. Where the decree is for final distribution, statutory provisions which relate wholly to partial distribution are not applicable: *Estate of Sheid*, 122 Cal. 528; 55 Pac. Rep. 328; *Estate of Coursen* (Cal.), 65 Pac. Rep. 965, 967. An order of distribution is final, and the court has no power, after such a decree is made, to make a different disposition of a portion of the estate pending an appeal perfected from such final decree: *Estate of Garraud*, 36 Cal. 277, 280. It is within the province of the probate court to define the rights of all who have legally or equitably any interest in the property of the estate derived from the will, whether they are entitled to any present enjoyment, or their interests are contingent: *Goad v. Montgomery*, 119 Cal. 552, 558; 63 Am. St. Rep. 145; 51 Pac. Rep. 681. For the purpose of enabling the court to distribute the estate of the testator in accordance with his will, it is required to consider the will as well as the estate left by him, and to construe its terms for the purpose of determining his intention, and to make its order or decree of distribution in accordance with such construction: *Goad v. Montgomery*, 119 Cal. 552, 557; 51 Pac. Rep. 681. A decree of distribution that property be distributed "subject to the claim of said adminis-

trator" for a designated sum is, in effect, declaring that the property is charged with the payment of the sum named. It creates a lien on the property by operation of law, and the court has the right and power to so charge the property: *Finnerty v. Pennie*, 100 Cal. 404, 407; 34 Pac. Rep. 865. A mortgage is not a conveyance, but only a contract by which property is hypothecated for the performance of an act. Hence no distribution of the estate of a deceased person can be made to the mortgagee of an heir or devisee, or to an assignee, as security: *Estate of Crooks*, 125 Cal. 459, 460, 461; 58 Pac. Rep. 89. Where one has succeeded to the interest of a widow, and petitions for a distribution to him of such interest, the court has power to make the distribution of such interest, but any further than that the decree is a nullity: *Estate of Grider*, 81 Cal. 571; 22 Pac. Rep. 908, 910. While the statute authorizes the probate court to assign shares of real estate only to the heirs, or to persons to whom they have "conveyed," that court has no authority to assign the share of an heir to another who does not hold a valid conveyance of the title: *In re Delehanty's Estate (Ariz.)*, 95 Pac. Rep. 109, 111; *Martinovich v. Marsicano*, 137 Cal. 354, 358; 70 Pac. Rep. 459; *Estate of Ryder*, 141 Cal. 366, 369; 74 Pac. Rep. 993. Property may be distributed, though not in the possession of the administrator, and even although adversely held and claimed under title: *Estate of Kennedy*, 129 Cal. 384, 387; 62 Pac. Rep. 64. If advances have been made by an administrator to a distributee, and the latter's share of the estate distributed to him is not sufficient to pay such advances, the court should distribute his share subject to the payment of the amount found to be due from him to the administrator: *Estate of Moore*, 96 Cal. 522, 530; 32 Pac. Rep. 584. A court has power to distribute a trust for charitable purposes to trustees, subject to limitation, to hold the legal title to part of the property and the remainder in trust for heirs: *Estate of Hincley*, 58 Cal. 457, 517. If the same person is executor and also a trustee under the will, the court, in ordering a distribution of the estate, may direct him to credit his account as executor with so much of the estate as may be ordered transmuted to his account as trustee: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 517.

REFERENCES.

Power of court as to distribution: See head-line 7, subd. 4, ante.
Retention of distributee's share for debt: See head-line 12, subd. 3, ante.

(3) **Not an escheat.** An order of the probate court that the county treasurer pay into the state treasury "all moneys and effects in his hands belonging to said estate," does not distribute the fund in question to the state as being entitled thereto, under the law of succession, or otherwise. The decree or order is not in the nature of an escheat of the funds so deposited to the state; it is rather an

order that such moneys and effects be held on deposit as the property of said estate, subject to the claims of heirs of said decedent, who may come forward to claim the same within the time allowed by law: *Estate of Miner*, 143 Cal. 194, 197; 76 Pac. Rep. 968.

(4) **Notice.** A decree of distribution can be made only after notice, but the notice is sufficient where it appears to be in due form, was signed by the clerk of a proper court through his deputy, was posted according to law by a person qualified by law so to do, and there is no evidence in the record that he did not act for said clerk, or that said notice did not remain where posted for the time required by law, and the final decree of distribution contains a recital that "it appears by proper evidence that the notice, as prescribed by law, had been given of the hearing of said petition and of the settlement of said final account." This is sufficient and conclusive evidence of the fact that the necessary notice was given: *Estate of Sbarboro*, 70 Cal. 147, 149; 11 Pac. Rep. 563; *McClellan v. Downey*, 63 Cal. 520. In a case where the testator provided in his will that his wife should manage his estate as trustee, but she subsequently renounced her trust and consented to the substitution of her son as trustee, the order of substitution was not void for want of notice to minor trustees who were not beneficiaries, where, during the life of the wife, she and those persons who were beneficially interested in the property and its management, were alone affected by the order made and in the question as to who should act as such manager: *Moore v. Superior Court*, 86 Cal. 495, 496; 25 Pac. Rep. 22.

(5) **Annulling will after distribution.** Whether an instrument propounded as a will was executed in the manner prescribed by law, is what it purports to be, the last will and testament of the deceased, are facts that the probate court is called upon to determine in the exercise of the jurisdiction it has acquired over the subject-matter and over the parties in interest, and when that court decides that such instrument was properly executed, and that it is the last will and testament of the deceased, and proceeds to administer the estate, its acts, and those of the executor under its authority and pursuant to the statute, are valid and binding as to all dealings with third parties had in good faith and for value. Precisely the same reason that protects a purchase consummated from an executor or administrator before his administration is revoked or superseded, protects the purchaser from the distributee of the estate. When the probate of the will has been annulled upon a contest instituted by an heir subsequent to an entry of a decree of distribution, the heir may undoubtedly pursue the property, and perhaps its proceeds, in the hands of the distributee, but, for the reason already given, he cannot follow the property into the hands of one who bought in good faith and for

value from the executor, administrator, or distributees prior to the revocation, and at a time when the proceedings appeared to be, and were, valid and binding: *Thompson v. Samson*, 64 Cal. 330, 333; 30 Pac. 980.

(6) **Error. Irregularity. Nullity.** A decree of the probate court discharging an executor, before a decree of distribution has been made, is premature, but not void, as there is nothing in the decree to show that any part of the estate still remains in the hands of the executors. The decree of distribution and discharge may take effect contemporaneously: *Dean v. Superior Court*, 63 Cal. 473, 474, 475, 477. A decree of distribution which does not dispose of all the assets is erroneous. Thus, if the will of the testatrix devises to her son all her interest in the estate owned by his father, her first husband, at his death, and the decree distributes the residue of the said estate "hereinafter particularly described" to the second husband of the testatrix and to her surviving children by him, describing the property, "and any other property not now known or discovered, which may belong to the said estate, or in which the said estate may have any interest," there is at least a question whether this provision would not carry any after-discovered property belonging to the testatrix's first husband at his death, and would bind her legatee, where he is a party to the proceeding. And this doubt is strengthened by the fact that the decree makes no mention of his right to any such property. The decree, in such a case, should make some disposition of this asset of the estate: *Estate of Coursen (Cal.)*, 65 Pac. Rep. 965, 967. Error by the clerk of the court in indorsing different numbers upon the petition for distribution, and upon the statement of account and decree of distribution, is not material where there is but one estate and the papers all belong to the settlement of one and the same estate: *Estate of Sheid*, 129 Cal. 172, 176; 61 Pac. Rep. 920. If a legatee has no interest in property distributed, the fact that an improper distribution thereof was made by the final decree, does not prejudice him. *Estate of Coursen (Cal.)*, 65 Pac. Rep. 965, 967. Neither does a false designation prejudice other particulars of a description of land contained in a decree of distribution, if the land described is capable of identification by extrinsic evidence: *Wheeler v. Bolton*, 66 Cal. 83, 86; 4 Pac. Rep. 981. It is error to make distribution to an insane person who does not appear by guardian for, in such a case, there is no competent person asking for it in his behalf: *In re Davis' Estate*, 27 Mont. 490; 71 Pac. Rep. 757, 761. No distribution of the estate prior to final settlement by administration can be had except as provided in the statute; and a distribution made without such steps having been taken, is void: *Abile v. Burnett*, 33 Cal. 658, 666. A decree of distribution, entered without notice of the proceeding to distributees, is void as to them, where they

did not appear in such proceedings; and it makes no difference that the court recites in its decree that notice was given to all parties. Such a recital, in the absence of notice, cannot give jurisdiction to the court. The court cannot, by declaring it has jurisdiction, invest itself with jurisdiction: *Estate of Grider* (Cal.), 21 Pac. Rep. 532, 533. A decree of distribution is intended to be a final disposition of the estate, and not contingent upon the establishment, at some future time, of the existence of a condition. A clause inserting a condition in the decree should not be included therein: *Estate of Garrity*, 108 Cal. 463, 474; 38 Pac. Rep. 628; 41 Pac. Rep. 485. Though the court makes an order construing a will and declaring certain persons entitled to a legacy bequeathed therein, such order, if erroneous, is not conclusive, but may be corrected by the court on making final distribution: *Estate of Casement*, 78 Cal. 136, 141; 20 Pac. Rep. 362.

(7) **Effect of decree.** Upon the entry of the decree of distribution, such decree becomes the measure of the rights of the parties interested in the estate, and the will is entitled to no further consideration for that purpose, except upon a direct appeal from the decree: *In re Trescony*, 119 Cal. 568, 570; 51 Pac. Rep. 951; *Jewell v. Pierce*, 120 Cal. 79, 83; 52 Pac. Rep. 132; *Cunha v. Hughes*, 122 Cal. 111, 112; 54 Pac. Rep. 535; *Williams v. Marx*, 124 Cal. 22, 24; 56 Pac. Rep. 603; *McKenzie v. Budd*, 125 Cal. 600, 602; 58 Pac. Rep. 199. An order of distribution protects the administrator, if he disposes of the property in accordance with its terms; and, if the court had jurisdiction to hear the petition, the order of distribution will be a complete protection against any claim that may be made against him by reason of his compliance therewith: *Estate of Williams*, 122 Cal. 76, 77; 54 Pac. Rep. 386. As against the estate the rights of the distributees are fully adjudicated by the decree of distribution: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 865. But the utmost effect of a decree of distribution, with respect to strangers, is to render the decree binding as to all property before the court, and subject to administration and distribution by it. It has no effect as to property beyond the court's jurisdiction, and is not evidence against a stranger when the action concerns property beyond its jurisdiction: *Mace v. Duffy*, 39 Wash. 597; 81 Pac. Rep. 1053. A decree of distribution by the probate court will not defeat an action of one who was not an heir, and who was not a party to any of the proceedings in that court, when it was settling the estate of the deceased person: *Coats v. Harris*, 9 Ida. 458; 75 Pac. Rep. 243. A decree of distribution of the estate of the decedent settles the question of heirship: *Mulcahey v. Dow*, 131 Cal. 73, 76; 63 Pac. Rep. 158; and the grantee of an heir or devisee, or any person who claims under an heir or devisee, is bound by the decree as fully as would be the heir or devisee himself, if he had not made the conveyance: *William Hill Co. v. Lawler*, 116 Cal.

359, 362; 48 Pac. Rep. 323. The final distribution of an entire estate, is an investiture of the absolute right and title thereto in the distributees: *Estate of Garraud*, 36 Cal. 277, 280; but the title of the heirs does not originate in the decree of distribution. It comes to them from their ancestor, and the settlement of the estate in the probate court; and the final decree of distribution in that court, only serves to release their property from the conditions to which, as the estate of a deceased person, it is subject: *Bates v. Howard*, 105 Cal. 173; 38 Pac. Rep. 715, 718. A decree of distribution which purports to distribute undivided interests in all the property of the decedent, and all other property not known or discovered, which may belong to the deceased, or in which his estate may have an interest, will pass title to lands of the decedent omitted from the particular description in the decree: *Smith v. Biscailuz*, 83 Cal. 344, 360; 21 Pac. Rep. 15; 23 Pac. Rep. 314. But if a son, pending administration of his father's estate, makes a deed of his interest therein, such deed does not carry an after-acquired title distributed to the son under a decree of distribution of the estate of his mother who, as widow, was the sole distributee in fee of the father's estate, where the deed did not purport to convey title in fee, and could not therefore carry an after-acquired title: *McKenzie v. Budd*, 125 Cal. 600, 602; 58 Pac. Rep. 199.

REFERENCES.

Conclusiveness of decree of distribution and power of chancery to correct or to set aside the settlement of accounts in probate courts: See note 48 Am. Dec. 744-751.

(8) **Conclusiveness of decree as to persons.** Upon an application for the distribution of an estate, after the notice prescribed by the statute has been given, the entire world is notified to be present at the hearing and to make known their claims, if any they have, to the estate of the decedent or any portion thereof, and the decree of distribution becomes a judicial determination of their claims, which, unless reversed, set aside, or modified upon appeal, is conclusive of their rights, the same as is a final judgment in any other action or proceeding. By giving the notice in the manner prescribed by the statute, the court acquires jurisdiction of all persons entitled to assert any claims to the estate, and, whether they appear and present their claim for adjudication, or fail to appear and suffer default, the judgment is conclusive, not only as to the persons who had any rights in the estate, but also as to the extent and limitation of their rights: *William Hill Co. v. Lawler*, 116 Cal. 359, 362; 48 Pac. Rep. 323; *Crew v. Pratt*, 119 Cal. 139, 149; 51 Pac. Rep. 38; *Goad v. Montgomery*, 119 Cal. 552, 558; 63 Am. St. Rep. 145; 51 Pac. Rep. 681; *In re Trescony*, 119 Cal. 568, 570; 51 Pac. Rep. 951; *Cunha v. Hughes*, 122 Cal. 111, 113; 54 Pac. Rep. 535; *Jewell v. Pierce*, 120 Cal. 79, 83; 52 Pac. Rep.

132; *McKenzie v. Budd*, 125 Cal. 600; 58 Pac. Rep. 199; *Toland v. Earl*, 129 Cal. 148, 152; 79 Am. St. Rep. 100; 61 Pac. Rep. 914; *Muleahey v. Dow*, 131 Cal. 73, 77; 63 Pac. Rep. 158; *Estate of Miner*, 143 Cal. 194, 204; 76 Pac. Rep. 968; *Estate of Murphy*, 145 Cal. 464, 468; 78 Pac. Rep. 960; *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864; *Lewis v. Woodrum* (Kan.), 92 Pac. Rep. 306. A decree of settlement made by a probate court, an apportionment of the residue of the estate among those entitled to share in it, and an order of distribution are binding and conclusive upon all having notice of the proceedings unless they are vacated or set aside upon the grounds and by the methods prescribed by statute: *Lewis v. Woodrum* (Kan.), 92 Pac. Rep. 306. In Kansas it is not necessary that the administrator give any other notice than that of final settlement, provided for in the statute, to make an order of distribution of the estate of a decedent, made by the probate court, effective and binding upon persons claiming a right to share in such distribution as heirs, or otherwise: *Scrubbs v. Scrubbs*, 69 Kan. 487; 77 Pac. Rep. 269. As the court can exercise jurisdiction over the persons only to whom the estate is to be distributed, it is these persons only who can be affected by the notice for distribution, or be required to give it any attention. The notice is necessarily limited in its effect to those who are entitled to have the property distributed to them: *Martinovich v. Marsicano*, 137 Cal. 354, 359; 70 Pac. Rep. 459. The administrator or executor is bound by the decree of settlement and distribution of an estate: *McNabb v. Wixom*, 7 Nev. 163. It is the duty of everyone interested in a decree of distribution to appear at the hearing and to assert his rights in the court having jurisdiction of the estate; and poverty and poor health is not a sufficient excuse to shield a person who claims an interest in the estate from being charged with laches, if he makes no effort to appear and assert his rights: *Royce v. Hampton*, 16 Nev. 25. A proceeding to obtain a decree of distribution is essentially a proceeding in the nature of one in rem, the all-important question upon the hearing is, who are the heirs entitled to the estate, and the statute makes the decree, subject to appeal, conclusive on that question: *Muleahey v. Dow*, 131 Cal. 73, 76, 77; 63 Pac. Rep. 158.

REFERENCES.

Conclusiveness of decree: See, also, head-line 12, subd. 4, ante. Conclusiveness of decrees of distribution and power of chancery to correct or to set aside a settlement of accounts in probate courts: See note 48 Am. Dec. 744-751.

(9) **Conclusiveness of decree as to subject-matter.** The fair and legitimate interpretation of the statute is, that a judgment or order respecting the administration of the estate is conclusive upon the administration as to all matters directly involved in such judgment or

order: *Howell v. Budd*, 91 Cal. 342, 349; 27 Pac. Rep. 747. The decree of distribution is final and conclusive as to the legacies: *Hill v. Den*, 54 Cal. 6, 23. If a party has been properly brought before the court, at the hearing, upon the application for a distribution of the estate, he has an opportunity to make objections, and, whether he makes them or not, he is equally bound by the decree: *Smith v. Vandeppeer*, 3 Cal. App. 300, 302; 85 Pac. Rep. 136, 137. The right of a legatee is finally and conclusively established by the decree of distribution; and, in the absence of appeal therefrom, it is the duty of the executor or administrator simply to deliver the property distributed to the distributees: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 866. A decree of distribution is conclusive as to the rights of heirs, legatees, or devisees in regard to the proportions or parts to which each is entitled: *Estate of Kennedy*, 129 Cal. 384, 387; 62 Pac. Rep. 64. If a court has jurisdiction to take the management and control of property, and to determine the amount of charges thereon, and to direct their payment out of the property, and to return the surplus to the parties entitled thereto, its judgment in determining the amount of such surplus, and designating the persons to whom it is to be given, is necessarily conclusive upon them and they take their portions of the surplus under and by virtue of the judgment, and not adversely thereto: *Estate of Burdick*, 112 Cal. 387, 400; 44 Pac. Rep. 734. A decree of distribution is conclusive as to the rights of heirs, legatees, or devisees only so far as they claim in such capacity: *Chever v. Ching Hong Poy*, 82 Cal. 68, 71; 22 Pac. Rep. 1081. Such decree is conclusive only as to the matter actually litigated. It is conclusive only as to succession or testamentary rights: *More v. More*, 133 Cal. 489, 495; 65 Pac. Rep. 1044. The decree is conclusive only as to heirs: *Estate of Burdick*, 112 Cal. 387, 392, 395; 44 Pac. Rep. 734; *Estate of Young*, 123 Cal. 337, 346; 55 Pac. Rep. 1011.

(10) **Decree is not conclusive as to whom, and what.** A decree of distribution is not conclusive as to one not an heir: *Estate of Rowland*, 74 Cal. 523, 526; 16 Pac. Rep. 315; *Finnerty v. Pennie*, 100 Cal. 404, 407; 34 Pac. Rep. 869. As the decree is conclusive only as to the rights of heirs, legatees, and devisees, the claimant, in his own right, antagonistic to the estate, is not concluded thereby. A decree of distribution is not conclusive as to antagonistic claims: *Estate of Rowland*, 74 Cal. 523, 526; 16 Pac. Rep. 315; *Finnerty v. Pennie*, 100 Cal. 404, 407; 34 Pac. Rep. 869. It does not conclude a legatee under a will, who claims certain property in the hands of the executor in his own right, from asserting his adverse claim against the distributee: *Estate of Rowland*, 74 Cal. 523, 526; 16 Pac. Rep. 315. It does not conclude the rights of the administrator as an adverse claimant of a lien upon the estate: *Finnerty v. Pennie*, 100 Cal. 404, 407; 34 Pac. Rep. 869. It does not conclude the claims of a surviving

husband to certain property, in the possession of the executors of the will of his deceased wife, as community property: *Estate of Rowland*, 74 Cal. 523, 525; 16 Pac. Rep. 315. A decree of settlement and distribution, subject to bonds given by distributees, does not conclude the sureties until they have a right to be heard in a regular action in which they are made parties: *Noble v. Witten*, 34 Wash. 507; 76 Pac. Rep. 95, 96.

(11) **Enforcement of decree, contempt, execution.** Disobedience of an order of final distribution of an estate may be enforced by proceedings for contempt: *Ex parte Smith*, 53 Cal. 204, 208; *Wheeler v. Bolton*, 54 Cal. 302, 305; *Estate of Clary*, 112 Cal. 292, 294; 44 Pac. Rep. 569; *Ex parte Cohn*, 55 Cal. 193, 196; *Estate of Kennedy*, 129 Cal. 384, 387; 62 Pac. Rep. 64; *Estate of Wittmeier*, 118 Cal. 255, 256; 50 Pac. Rep. 393. But while the court in probate may, through the medium of contempt proceedings, compel an executor or administrator to deliver to a distributee property distributed by its order or decree, the statute in terms authorizes distributees to demand, sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 865. If an administrator has a personal claim against the distributee of an estate, and has been directed to pay to such distributee his share of the estate, the administrator cannot defeat the distributee on the ground that a garnishment has been served by the assignee upon such administrator against the distributee on the claim assigned. An administrator cannot be permitted to juggle with funds belonging to a distributee, nor to avail himself of his trust relationship to secure a personal advantage in the collection of a claim against the cestui qui trust: *McLaughlin v. Barnes*, 12 Wash. 373; 41 Pac. Rep. 62, 63. A decree of distribution of the estate of a deceased person is an adjudication as to rights only, and cannot be executed by any form of process: *Estate of Kennedy*, 129 Cal. 384, 387; 62 Pac. Rep. 64. Hence, no execution can issue for the enforcement of an order of distribution: *Ex parte Smith*, 53 Cal. 204, 208. If a decree of distribution orders the executor to pay a specified sum of money to distributees, his failure to comply with such order is a contempt of court, for which he may be punished as for a contempt: *Ex parte Smith*, 53 Cal. 204, 208. When a decree of distribution has been made, the probate court has no longer jurisdiction of the property distributed, unless to compel delivery; and the distributee thenceforth has an action to recover his estate, or, in proper cases, its value: *Wheeler v. Bolton*, 54 Cal. 302, 305.

REFERENCES.

Right of action to recover property: See head-line 12, subd 4, ante.
Suits against an executor or administrator individually, to recover a

distributee's share of an estate: See division II, head-line 4, subd 2, ante.

(12) **Collateral attack.** A decree of distribution cannot be attacked collaterally on the ground of error or irregularity in the proceedings as to matters adjudicated therein: *William Hill Co. v. Lawler*, 116 Cal. 359, 364; 48 Pac. Rep. 323; *Lynch v. Rooney*, 112 Cal. 279, 287; 44 Pac. Rep. 565; *Crew v. Pratt*, 119 Cal. 139, 152; 51 Pac. Rep. 38; *In re Trescony*, 119 Cal. 568, 570; 51 Pac. Rep. 951; *Jewell v. Pierce*, 120 Cal. 79, 83; 52 Pac. Rep. 132; *Williams v. Marx*, 124 Cal. 22, 24; 56 Pac. Rep. 603; *Middlecoff v. Superior Court*, 149 Cal. 94; 84 Pac. Rep. 764. Thus when it is made to appear by the record that no account was really necessary, and that it had been waived, the irregularity in not filing an account is effectually cured as to the distributee, who has acquired the right to have the whole residue distributed to her absolutely, and, there being no objection, or appeal by any other person, the decree of distribution is thereby rendered valid and secure against collateral attack: *Middlecoff v. Superior Court*, 149 Cal. 94; 84 Pac. Rep. 764, 766. A court is also bound by the order of distribution, and commits error by allowing the widow, in a collateral proceeding, to take anything but the estate allotted to her by will: *Webster v. Seattle Trust Co.*, 7 Wash. 642; 33 Pac. Rep. 970, 971. An order distributing an estate cannot be collaterally attacked except for fraud: *Ryan v. Kinney*, 2 Mont. 454.

(13) **Vacating decree. Fraud. Equity.** A probate court has no jurisdiction, after a decree of distribution and discharge, and after the time specified in the statute for giving relief from judgments obtained through "mistake, inadvertence, surprise, or excusable neglect," to entertain a petition to set aside a decree for fraud, or because the court had been imposed upon by false testimony. In such cases, however, courts of equity have jurisdiction to afford proper relief: *Estate of Hudson*, 63 Cal. 454, 457; *Wheeler v. Bolton*, 54 Cal. 302, 305; *Moore v. Superior Court*, 86 Cal. 495, 496; 25 Pac. Rep. 22; *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 589, 594; 40 Pac. Rep. 810. The probate court has power, at any time within six months after the entry of a decree of distribution, to set it aside on a proper showing of "mistake, inadvertence, surprise, or fraud": *De Pedrorena v. Superior Court*, 80 Cal. 144, 145; 22 Pac. Rep. 71. After the statutory period for obtaining relief against a decree of distribution on the ground of "mistake, inadvertence, surprise, or fraud," the decree can be attacked and set aside only by a proceeding in equity: *Estate of Cahalan*, 70 Cal. 604, 607; 12 Pac. Rep. 427; *Dean v. Superior Court*, 63 Cal. 473. It may be that the probate of a will cannot be reviewed in equity, but the proposition that a decree of distribution is subject to reversal in equity, upon a showing that it was procured by fraud

or mistake, is settled. The general rule that all final judgments are subject to attack for fraud or mistake does not apply to decrees probating wills. Such decrees are universally admitted to be an exception to the general rule, however unsatisfactory and illogical may be the reasons given to support such exception; and a decree of distribution is not such a part of the same probate proceeding as the decree probating a will, that it must be governed by the same rule: *Bacon v. Bacon*, 150 Cal. 477, 483; 89 Pac. Rep. 317, 319. A suit in equity may be maintained to set aside a decree of distribution which shows the result of a mistake, not of the court, but of the parties interested in the estate, where plaintiff has not been guilty of laches, and such a suit is a direct attack on the order of distribution, in which the probated will is competent evidence to prove the error: *Bacon v. Bacon*, 150 Cal. 477; 89 Pac. Rep. 317, 324. Where a decree of distribution is obtained by extrinsic fraud, as where the executrix connived with a false claimant to make it appear that he was a child of decedent when in fact he was not so, and allowed distribution to be made to him of a portion of the estate, in fraud of the minor children of the decedent, whose rights it was her duty to protect, such decree of distribution may be relieved against in equity and the fraudulent distributee be held as a trustee for the rightful heirs: *Sohler v. Sohler*, 135 Cal. 323, 330; 67 Pac. Rep. 282; 87 Am. St. Rep. 98. If a decree of final distribution is erroneous as to the law or the facts, the remedy is by appeal. Mere error is not a ground for relief in equity: *Daly v. Pennie*, 86 Cal. 552, 553; 21 Am. St. Rep. 61; 25 Pac. Rep. 67; *Smith v. Vandeppeer*, 3 Cal. App. 300; 85 Pac. Rep. 136, 137. But if a direct attack is made upon the ground of fraud, the fact that the fraud was discovered in time for plaintiffs to have availed themselves of it in the probate court does not affect their right to relief in a court of equity: *Olivas v. Olivas*, 61 Cal. 382, 387. A decree of distribution cannot be set aside in equity for want of personal notice to the heirs, because the statute does not require personal notice: *Daly v. Pennie*, 86 Cal. 552; 21 Am. St. Rep. 61; 25 Pac. Rep. 67. But it may be set aside by a court of equity, at the instance of the party injured thereby, where no notice was given of the hearing of the petition for distribution: *Baker v. Riordan*, 65 Cal. 368; 4 Pac. Rep. 232, 234; *In re McFarland's Estate*, 10 Mont. 586; 27 Pac. Rep. 389. The statute of limitations does not commence to run against an action to set aside a decree of distribution for mistake until the mistake is discovered: *Bacon v. Bacon*, 150 Cal. 477; 89 Pac. Rep. 317, 323.

(14) **Vacating premature decree.** An order of distribution may be set aside and vacated by the court where the same was prematurely made, and where requirements of the statute in the administration of the estate were not complied with, such as making an inventory and appraisement of the estate, the giving of due notice to heirs at law

by the mailing of notices in addition to the publication, and setting the time required by statute before ordering the distribution of the estate; and where it further appears that the distribution of the estate made under the will of decedent was not in accordance with the provisions of law applicable to the facts before the court when the order was made. In such a case the decree of the court below construing the will of decedent, ordering distribution of the estate, and approving the final account of said administrator, and discharging him and his bondsmen, and declaring said estate closed, will be set aside and wholly annulled, and the court below will be ordered to reopen the administration of the estate, and to proceed with the administration, settlement, and distribution thereof, subsequent to the issuance of letters of administration with the will annexed, in the manner provided by law: *In re McFarland's Estate*, 10 Mont. 586; 27 Pac. Rep. 389, 391.

(15) **Loss of jurisdiction.** When a decree of distribution is made, the probate court has no longer jurisdiction of the property distributed, unless to compel delivery, and the distributee thenceforth has a right of action to recover his estate, or, in proper cases, its value: *Wheeler v. Bolton*, 54 Cal. 302, 305; *Buckley v. Superior Court*, 102 Cal. 6, 10; 41 Am. St. Rep. 135; 36 Pac. Rep. 360; *Morffew v. San Francisco etc. R. R. Co.*, 107 Cal. 587, 594; 40 Pac. Rep. 810. And as the court, after issuing a decree of distribution of an entire estate, loses jurisdiction of the property distributed, it cannot afterwards make a different disposition of a portion of the property so distributed: *Prefontaine v. McMicken*, 16 Wash. 16; 47 Pac. Rep. 231, 232. The probate court loses jurisdiction of the property distributed after decree rendered, for all purposes whatever except that of enforcing the order: *Prefontaine v. McMicken*, 16 Wash. 16; 47 Pac. Rep. 231. Until there has been a final settlement of the estate, and a distribution of the property, or some other act equivalent thereto, the jurisdiction of the probate court over the estate has not been determined: *Hazleton v. Bogardus*, 8 Wash. 102; 35 Pac. Rep. 602, 603.

15. Payment. Duty of executors. An executor should not go beyond his duty and trench upon the jurisdiction of the court by assuming, in advance of a decree of distribution, to construe the terms of the will, the validity of particular bequests, who are beneficiaries thereunder, or to make payments of the funds of the estate upon his own judgment as to these matters. This is not only trenching upon the jurisdiction of the court, but is infringing the rights of all persons interested in the estate to have these matters disposed of solely on distribution, partial or final: *Estate of Willey*, 140 Cal. 238, 241; 73 Pac. Rep. 998. Executors are liable for wrongfully making payment of the shares of certain distributees to their pretended

attorney: *Bryant v. McIntosh*, 3 Cal. App. 95, 96; 84 Pac. Rep. 440. It is the duty of the executor or administrator to deliver the property distributed to the distributees; and, unless the decree expressly provides otherwise, he is entitled to nothing more than a receipt for the property from such distributees. If the decree gives the property in trust for certain purposes, the mere acceptance of the property under the decree by the distributees, with knowledge of the provisions of the decree, is an acceptance of the trust, under all the terms and conditions declared by the decree, and no other acceptance is required. If the legatee having accepted the trust by acceptance of the legacy under the decree declaring it, and therefore, subject to the terms and conditions imposed, refuses to carry it out, or diverts the money to other purposes, the law may afford a remedy to any one beneficially interested. But the executor has no supervisory power with respect to that. He is called upon by the decree simply to deliver the property distributed. He has no right to require from the distributee any agreement as to the performance of the trust as a condition precedent to delivery, and any statement by the distributee to the executor as to his intention in the matter of such performance is absolutely immaterial: *St. Mary's Hospital v. Perry* (Cal.), 92 Pac. Rep. 864, 866. The administrator is a wholly indifferent party. It is for the court to say to whom the residue of the estate shall go, and under what conditions it shall go, and it is the duty of the administrator to deliver the residue of the estate to the parties designated by the court: *McCabe v. Healy*, 138 Cal. 81, 90; 70 Pac. Rep. 1008. A decree of distribution of an estate to a fraudulent grantee, as successor of the defrauded party, is not conclusive of the equities between the parties, or of the constructive trust raised by the fraud, as such matter was not actually litigated in the matter of the estate: *More v. More*, 133 Cal. 489, 495; 65 Pac. Rep. 1044. An executrix, in her representative capacity, has no right to object to paying legatees on the ground that they have forfeited their rights to legacies by an alleged violation of a provision in the will: *Estate of Murphy*, 145 Cal. 464; 78 Pac. Rep. 960, 961.

16. Distribution without decree. A disposition of the property of a decedent, without decree of court authorizing it, is not necessarily void. When the claims of creditors are paid, or are barred, and the costs and charges of administration are satisfied, the estate is for all practical purposes fully administered upon, the right of possession in the administrator terminates, and the right of the heirs to the residue of the estate in his hands becomes absolute. The heirs are then entitled to have this residue delivered over to them, as their own property under the law; and it is made the duty of the administrator, by the statute, to surrender the property to them. This duty they can enforce by obtaining a decree of the court directing its performance.

As such a decree, however, neither creates their title nor their rights of possession to the property, a distribution made without it cannot be invalid. And especially is this so where the distributees are of adult age and otherwise competent to contract, and they agree among themselves, and with the administrator, upon the terms of distribution, and enter into the possession of the property after the distribution is made. The heirs but come into the possession of their own property with the consent of the only person who can rightfully withhold possession from them, and they are not to be disturbed in such possession because of informality in obtaining it. Nor can an administrator be charged with maladministration for distributing property without a decree of the court authorizing it, if it is done after the debts of the estate and the costs and charges of administration have been paid, and it is made to those having the right to the property. After the creditors are paid, or are barred, the distributees alone are interested in the estate. And when they are estopped from objecting, as they are, either by agreeing to distribution, or by accepting the property when distributed, there is no one left who can lawfully complain, and the administrator is entitled, on the settlement of his final account, to have his act approved: *Griffin v. Warburton*, 23 Wash. 231; 62 Pac. Rep. 765, 767.

17. Rights of creditors. Set-off. Garnishment. The share of a distributee does not come within the reach of creditors until after it has been distributed by the court, but, after such distribution, the share of an heir or devisee may be garnished by his creditor or may be reached by proceedings supplementary to execution: *Estate of Nerac*, 35 Cal. 392, 398; 98 Am. Dec. 111; *Dunsmoor v. Furstenfeldt*, 88 Cal. 522, 528; 22 Am. St. Rep. 331; 26 Pac. Rep. 518; 12 L. R. A. 508; *Harrington v. La Rocque*, 13 Or. 344; 10 Pac. Rep. 498, 499. When the distributive share of an heir has been ascertained, and ordered to be paid by the court, it is no longer regarded as in the "custody of the law." The right to it has become fixed, and the executor ceases to hold it in his representative capacity. After such distribution and order he holds it in his personal capacity: *Harrington v. La Rocque*, 13 Or. 344; 10 Pac. Rep. 498, 499. In Washington, after the administrator has been directed by the court to pay a distributee, the representative cannot set off a personal claim against the distributee; nor can he avoid such payment by the plea that he has been garnished for such distributive share: *McLaughlin v. Barnes*, 12 Wash. 373; 41 Pac. Rep. 62, 63. But in California an unpaid judgment of the estate against a surviving wife may be set off against her share in the estate, irrespective of the fact of her insolvency: *Estate of Angle*, 148 Cal. 102; 82 Pac. Rep. 668, 670. After distribution a creditor cannot maintain an equitable action, on the ground of fraud, to annul all the proceedings in the matter of an estate, where he was charged

with constructive notice of the proceedings, and was chargeable with inexcusable laches in not obtaining relief, if a fraud was being perpetrated: *Tynan v. Kerns*, 119 Cal. 447, 451; 51 Pac. Rep. 693. The court, upon petition of the distributees, and over the objections of the creditors, or without their consent, will not arrest the course of administration, charge the assets with a lien for the unpaid debts, legacies, and expenses, discharge the administrator from further duties respecting the estate, and deliver the property of the estate to the heirs, residuary legatees, or devisees, burdened only with the charge of the sums due, to be paid at the will of the distributees, or when they are compelled to do so by a suit to enforce the lien, particularly where the estate is not in a condition to have the administration closed. Each creditor is entitled to have the proceeding kept on foot, and the property kept in legal custody, until his debt is paid or secured in some manner provided in the statute; and he cannot be required to yield this right, or to accept a lien or charge on the property, to be enforced in some new and independent proceeding: *Estate of Washburn*, 148 Cal. 64; 82 Pac. Rep. 671, 672. Under the Kansas statute which gives the surviving wife one half of the husband's real estate, the undivided share thus allotted to her by the law may be levied upon and sold for the payment of her indebtedness: *Trowbridge v. Cunningham*, 63 Kan. 847; 66 Pac. Rep. 1015.

REFERENCES.

Garnishment of husband's interest in wife's legacy or distributive share: See note 47 L. R. A. 360. Garnishment of distributive shares and residuary legacies before settlement: See note 59 L. R. A. 387-389. Levy on interest of heir in ancestor's land: See note 23 L. R. A. 643. Indebtedness of heir to estate as counter-claim or set-off against distributive share in proceeds of real estate: See note 4 L. R. A. (N. S.) 189-191. Distributive share of heir in real estate as chargeable with heir's indebtedness to estate either as against land itself or the proceeds of a sale thereof: See note 7 Am. & Eng. Ann. Cas. 563.

18. Actions by transferees of choses in action. In respect to choses in action, an executor or administrator is invested with, and has authority to sell or to dispose of them by indorsement to another, or to a distributee, without an order of the probate court. Such a transfer is valid, and passes the title, so as to enable the transferee or distributee to maintain an action thereon, and the payers or makers of them, in the absence of fraud or collusion between the administrator and the person to whom he transferred them, cannot abate the action on the ground of a want of authority to make such transfer: *Weider v. Osborn*, 26 Or. 307; 25 Pac. Rep. 715. The transferee of a chose in action, upon distribution of the estate, and in payment of his share of the estate, may maintain an action thereon in his own

name: *Weider v. Osborn*, 20 Or. 307; 25 Pac. Rep. 715. Purchasers or indorsees of choses in action, sold or transferred by the administrator, may maintain an action on them in their own name, wherever an assignee is permitted to sue in his own name: *Weider v. Osborn*, 20 Or. 307; 25 Pac. Rep. 715.

19. Appeal.

(1) *In general.* Appeals may be taken from judgments and orders made in probate proceedings: *In re Tuohy's Estate*, 23 Mont. 305; 58 Pac. Rep. 722, 723; *In re Klein's Estate* (Mont.), 88 Pac. Rep. 798, 801; *In re Kelly's Estate*, 31 Mont. 356; 79 Pac. Rep. 244. If a final decree of distribution is erroneous whether as to the law, or as to the facts, the remedy is by appeal: *Daly v. Pennie*, 86 Cal. 552, 553; 21 Am. St. Rep. 61; 25 Pac. Rep. 67. On appeal it will be assumed that the probate court had jurisdiction of the subject-matter of the controversy where all the parties interested were before the court, and, without objection to the jurisdiction, asked for the distribution of the property in controversy: *Estate of Apple*, 66 Cal. 432, 433; 6 Pac. Rep. 7. An appeal by a person who does not show himself to be an "aggrieved party" will be dismissed; as, where a mortgagee appeals, and his interest in no way appears from the record: *Estate of Crooks*, 125 Cal. 459, 462; 58 Pac. Rep. 89. It is the duty of an executor or administrator to guard against the error of a distribution without some ample provision for all known obligations of the estate; and he has, therefore, a right to appeal from a decree of distribution: *In re Sullivan's Estate* (Wash.), 94 Pac. Rep. 483, 487. In Montana an appeal may be taken from a decree of distribution by the district court in a probate proceeding pending before it within one year from the rendition of the judgment: *In re McFarland*, 10 Mont. 445; 26 Pac. Rep. 185, 189; *In re Dewar's Estate*, 10 Mont. 422; 25 Pac. Rep. 1025. A decree of distribution may be modified on appeal: *In re Sullivan's Estate* (Wash.), 94 Pac. Rep. 483, 487. If a decree of distribution is made at the same time that a final settlement is made, and the decree of final settlement is reversed on appeal, the distribution may be disregarded, and a new distribution be made: *Estate of Kennedy*, 129 Cal. 384, 386; 62 Pac. Rep. 64. Pending an appeal from a decree of final distribution of an estate, made by a probate court, such court has no power to make any further disposition of the estate, and any order by which it attempts to do so, and which operates upon the same subject-matter as the former order, is null and void: *Estate of Garraud*, 36 Cal. 277, 280. The public administrator who makes and has no claim upon the estate beyond his commissions, and who did not file the petition for distribution therein, or take any part at its hearing, is not a necessary party to an appeal from the decree of distribution: *Jones v. Lamont*, 118 Cal. 499, 503; 62 Am. St. Rep. 251; 50 Pac. Rep. 766.

(2) **Stay of proceedings.** The perfecting of an appeal from a decree of distribution, by filing the undertaking mentioned in the statute, stays proceedings in the court below on the judgment appealed from: *Estate of Schedel*, 69 Cal. 241; 10 Pac. Rep. 334, 335. Thus where the court has allowed a sum of money to the executors for services rendered up to the date of the decree, an appeal by the widow from this decree suspends its execution, and, until the determination of such an appeal, the executors are not only precluded from distributing the estate in accordance with the terms of the decree, but are required to retain the property in their care and custody: *Firebaugh v. Burbank*, 121 Cal. 186, 190; 53 Pac. Rep. 560.

(3) **Who cannot appeal.** A decree of distribution will not be reviewed, on appeal by an executor or administrator, where he, as such, has no interest in the matter sought to be reviewed: *Merrifield v. Longmire*, 66 Cal. 180; 4 Pac. Rep. 1176, 1177; *In re Dewar's Estate*, 10 Mont. 422; 25 Pac. Rep. 1025, 1026; he has a right to appeal, if authorized by the statute: *In re Phillip's Estate*, 18 Mont. 311; 45 Pac. Rep. 222; but if not authorized, his appeal from a decree of distribution must be dismissed. He cannot, in any case, litigate the claims of one legatee as against others at the expense of the estate: *Jones v. Lamont*, 118 Cal. 499, 503; 62 Am. St. Rep. 251; 50 Pac. Rep. 766; *McCabe v. Healy*, 138 Cal. 81, 90; 70 Pac. Rep. 1008. Under statutory authority, an executor and legatees may appeal from a decree of distribution of an estate, or from any part thereof which adjudges that certain persons are entitled to share in the estate: *In re Klein's Estate*, 35 Mont. 185; 88 Pac. Rep. 798, 801. An executor and legatees may appeal from an order denying a motion for a new trial, in probate proceedings, on issues that others are entitled to distribution: *In re Kelly's Estate*, 31 Mont. 356; 79 Pac. Rep. 244; *In re Klein's Estate*, 35 Mont. 185; 88 Pac. Rep. 798, 801. Trustees who claim funds in the hands of the executor adversely to the estate, but who are not named in the will, and who have presented no claim against the estate, are not persons "aggrieved," who are authorized to appeal from a decree distributing the funds of the estate to the heir: *Estate of Burdick*, 112 Cal. 387, 396; 44 Pac. Rep. 734. An "adverse party" is every party whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken: *Estate of Young*, 149 Cal. 173; 85 Pac. Rep. 145.

(4) **Distribution pending appeal.** The distribution of an estate will be prohibited, pending an appeal. The court will not allow the general administrator to dissipate the fruits of the appeal before the appeal can be determined. The status of the parties litigant should be preserved so as to prevent the fruits of litigation from being lost

pending the appeal, and, when it becomes necessary in aid of the appellate jurisdiction, proper orders or writs will be issued to secure that end: *State v. Superior Court*, 28 Wash. 677; 69 Pac. Rep. 375, 377. If the administrator takes an appeal from the decree of final settlement, and, pending the appeal, a decree of distribution is made, such a decree of distribution may perhaps be disregarded, and a new distribution made, if the decree of final settlement is so modified, on appeal, as to show that the administrator has nothing in his hands whatever: *Estate of Kennedy*, 129 Cal. 384, 386; 62 Pac. Rep. 64. A decree of distribution does not fall within the provisions of the statute authorizing or requiring stay bonds. Hence if an appeal is taken from a decree of distribution, a special stay bond, given upon such appeal, is void for want of consideration, and no recovery can be had against the sureties: *Estate of Kennedy*, 129 Cal. 384, 388; 62 Pac. Rep. 64.

(5) **Review. Certiorari. Writ of review.** On appeal from a decree of distribution, the appellate court has jurisdiction to settle the rights of all interested parties: *Estate of Mayhew*, 4 Cal. App. 162, 164; 87 Pac. Rep. 417. Items in the will may be considered: *Estate of Mayhew*, 4 Cal. App. 162, 165; 87 Pac. Rep. 417; *Estate of Merchant*, 143 Cal. 537; 77 Pac. Rep. 475; but questions respecting the separate estate of the deceased, and community property belonging to him and his wife, which had finally been determined in the course of the administration of the estate, in special proceedings for that purpose, will not be reviewed on findings made on the application for distribution, which merely recite the ultimate facts so previously found: *Drasdo v. Jobst*, 39 Wash. 425; 81 Pac. Rep. 857, 859. So on appeal from a decree of final distribution, an objection to the jurisdiction of the court, on the ground of unsettled litigation, is not sustainable, where it appears from the record that whatever litigation there had been concerning the estate had been finally determined: *Drasdo v. Jobst*, 39 Wash. 425; 81 Pac. Rep. 857, 858. And a decree of distribution will not be disturbed upon appeal, unless the appellants show that their own interests in the estate have suffered by reason of the findings of the decree of the court. Appellants cannot be heard to complain that they have received some part of the estate that should have gone to the surviving wife or her legal representatives: *Estate of Kasner*, 1 Cal. App. 145, 147; 81 Pac. Rep. 991. A judgment committing an executor or administrator to jail until he complies with the terms of a decree of distribution cannot be reviewed upon a writ of certiorari, as a review under that writ extends only to the question whether the court regularly pursued its authority: *Ex parte Smith*, 53 Cal. 204. It is not a proper function of the writ of review to add to or modify the record with respect to jurisdictional facts determined therein, but to test the question of jurisdiction on the facts appearing on the face thereof. In a proceeding on certiorari to review a decree

of distribution, a recital of the order vacating a decree that all persons interested "were duly served with due notice" of the motion to vacate, is conclusive of that fact: *De Pedrorena v. Superior Court*, 80 Cal. 144, 146; 22 Pac. Rep. 71.

(6) **Reversal and its effect.** If a decree of distribution is reversed, the executors are entitled to restitution of the whole estate. The matter then stands as if no decree had ever been made: *Ashton v. Heydenfeldt*, 124 Cal. 14, 17; 56 Pac. Rep. 624; *Ashton v. Heggerty*, 130 Cal. 516, 520; 62 Pac. Rep. 934. An executor cannot appeal from a final decree of distribution, even though the property has been improperly distributed: *Estate of Coursen (Cal.)*, 65 Pac. Rep. 965, 967. Where a decree of distribution receives an unqualified reversal on appeal, it is ineffectual to prevent the recovery of property delivered under it by the executrix: *Ashton v. Heggerty*, 130 Cal. 516, 520; 62 Pac. Rep. 934.

(7) **Non-appealable orders.** The following are non-appealable orders. An order refusing to postpone the decree of final distribution: *Estate of Burdick*, 112 Cal. 387, 396; 44 Pac. Rep. 734; an order declaring who is entitled to a legacy in advance of a final judgment or order of distribution of the money which is the subject of the legacy: *Estate of Casement*, 78 Cal. 136, 138, 141; 20 Pac. Rep. 362; an order vacating an order of final distribution: *Estate of Murphy*, 128 Cal. 339; 60 Pac. Rep. 930, 931; an order refusing to set aside and to vacate a former order of distribution, and settlement of the final account of an executor: *Estate of Lutz*, 67 Cal. 457; 8 Pac. Rep. 39; *In re Kelly's Estate*, 31 Mont. 356; 79 Pac. Rep. 244; and an order committing an executor or administrator to jail until he complies with the terms of a decree of distribution. The statute relative to appeals from orders made after final judgment, are not applicable to probate proceedings: *Estate of Wittmeier*, 118 Cal. 255, 256; 50 Pac. Rep. 393.

(8) **Dismissal.** An appeal from a decree of distribution will be dismissed where it appears that the appellants have received payment in full of the distributive shares allotted to them in and by such decree: *Estate of Baby*, 87 Cal. 200, 202; 22 Am. St. Rep. 239; 25 Pac. Rep. 405. An executor's appeal from a decree of settlement and distribution must be dismissed, for he has no right to litigate the claim of one legatee as against the other at the expense of the estate: *Estate of Marrey*, 65 Cal. 287; 3 Pac. Rep. 896.

CHAPTER III.

DISTRIBUTION AND PARTITION.

- § 751. Estate in common. Commissioners.
- § 752. Partition, and notice thereof. Time of filing petition.
- § 753. Estate in different counties. How divided.
- § 754. Partition or distribution after conveyance.
- § 755. Shares to be set out by metes and bounds.
- § 756. Whole estate may be assigned to one, in certain cases.
- § 757. Payments for equality of partition. By whom and how made.
- § 758. Estate may be sold.
- § 759. Partition. Notice. Duties of commissioners.
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- § 772. Form. Order confirming commissioners' report and directing partition.
- § 773. Form. Decree of partition.
- § 774. Form. Report, by commissioners, recommending sale.
- § 775. Form. Order of sale of estate and distribution of proceeds.

PARTITION IN CONNECTION WITH DISTRIBUTION.

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| 1. Partition is authorized only in what cases. | 6. Same. Who entitled to distribution. |
| 2. Limited power of court. | 7. Essentials of decree and conclusiveness of. |
| 3. Petition and proceedings preliminary to decree. | 8. Power of court after decree. Notice. |
| 4. Requirement as to notice. | |
| 5. Limit as to whose interests may be recognized. | |

§ 751. Estate in common. Commissioners. When the estate, real or personal, assigned by the decree of distribution to two or more heirs, devisees, or legatees, is in common and undivided, and the respective shares are not separated and distinguished, partition or distribution may be made by three disinterested persons, to be appointed commissioners for that purpose by the court, who must be duly sworn to the faithful discharge of their duties, a certified copy of the order of their appointment, and of the order or decree assigning and distributing the estate, must be issued to them as their warrant, and their oath must be indorsed thereon. Upon consent of the parties, or when the court deems it proper and just, it is sufficient to appoint one commissioner only, who has the same authority and is governed by the same rules as if three were appointed. **Kerr's Cyc. Code Civ. Proc.**, § 1675.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1901.
- Idaho.*** Code Civ. Proc. 1901, § 4282.
- Montana.*** Code Civ. Proc., sec. 2860.
- Nevada.** Comp Laws, secs. 3004, 3007.
- North Dakota.** Rev. Codes 1905, §§ 8211, 8216.
- Oklahoma.*** Rev. Stats. 1903, sec. 1760.
- South Dakota.*** Probate Code 1904, § 312.
- Utah.** Rev. Stats. 1898, sec. 3958.
- Washington.** Pierce's Code, § 2682.
- Wyoming.*** Rev. Stats. 1899, sec. 4841.

§ 752. Partition, and notice thereof. Time of filing, petition. Such partition may be ordered and had in the superior court on the petition of any person interested. But before commissioners are appointed, or partition ordered by the court as directed in this chapter, notice thereof must be given to all persons interested who reside in this state, or to their guardians, and to the agents, attorneys, or guardians, if any in this state, of such as reside out of this state, either personally or by public notice, as the court may direct. The petition may be filed, attorneys, guardians, and agents appointed, and notice given at any time before the order or decree of distribution, but the commissioners must not be

appointed until the order or decree is made distributing the estate. **Kerr's Cyc. Code Civ. Proc.**, § 1676.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1902.
Idaho.* Code Civ. Proc. 1901, sec. 4283.
Montana.* Code Civ. Proc., sec. 2861.
Nevada. Comp. Laws, secs. 3005, 3006.
Oklahoma.* Rev. Stats. 1903, sec. 1761.
South Dakota.* Probate Code 1904, § 313.
Utah. Rev. Stats. 1898, sec. 3957.
Washington. Pierce's Code, § 2684.
Wyoming.* Rev. Stats. 1899, sec. 4842.

§ 753. **Estate in different counties, how divided.** If the real estate is in different counties, the court may, if deemed proper, appoint commissioners for all or different commissioners for each county. The estate in each county must be divided separately among the heirs, devisees, or legatees as if there was no other estate to be divided, but the commissioners first appointed must, unless otherwise directed by the court, make division of such real estate wherever situated within this state. **Kerr's Cyc. Code Civ. Proc.**, § 1677.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1903.
Idaho.* Code Civ. Proc. 1901, sec. 4284.
Montana.* Code Civ. Proc., sec. 2862.
Nevada. Comp. Laws, sec. 3008.
North Dakota. Rev. Codes 1905, § 8217.
Oklahoma. Rev. Stats. 1903, sec. 1762.
South Dakota. Probate Code 1904, § 314.
Utah. Rev. Stats. 1898, sec. 3960.
Washington.* Pierce's Code, § 2683.
Wyoming.* Rev. Stats. 1899, sec. 4843.

§ 754. **Partition or distribution after conveyance.** Partition or distribution of the real estate may be made as provided in this chapter, although some of the original heirs, legatees, or devisees may have conveyed their shares to other persons, and such shares must be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs, legatees, or devisees. **Kerr's Cyc. Code Civ. Proc.**, § 1678.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1904.
Idaho.* Code Civ. Proc. 1901, sec. 4285.
Montana.* Code Civ. Proc., sec. 2863.
Nevada.* Comp. Laws, sec. 3009.
North Dakota.* Rev. Codes 1905, § 8214.
Oklahoma.* Rev. Stats. 1903, sec. 1763.
South Dakota.* Probate Code 1904, § 315.
Utah.* Rev. Stats. 1898, sec. 3961.
Washington.* Pierce's Code, § 2685.
Wyoming.* Rev. Stats. 1899, sec. 4844.

§ 755. **Shares to be set out by metes and bounds.** When both distribution and partition are made, the several shares in the real and personal estate must be set out to each individual in proportion to his right, by metes and bounds, or description, so that the same can be easily distinguished, unless two or more of the parties interested consent to have their shares set out so as to be held by them in common and undivided. **Kerr's Cyc. Code Civ. Proc., § 1679.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1905.
Idaho.* Code Civ. Proc. 1901, sec. 4286.
Montana.* Code Civ. Proc., sec. 2864.
Nevada. Comp. Laws, sec. 3010.
North Dakota.* Rev. Codes 1905, § 8215.
Oklahoma.* Rev. Stats. 1903, sec. 1764.
South Dakota.* Probate Code 1904, § 316.
Utah. Rev. Stats. 1898, sec. 3957.
Washington.* Pierce's Code, § 2686.
Wyoming.* Rev. Stats. 1899, sec. 4845.

§ 756. **Whole estate may be assigned to one, in certain cases.** When the real estate cannot be divided without prejudice or inconvenience to the owners, the court may assign the whole to one or more of the parties entitled to share therein, who will accept it, always preferring the males to the females, and, among children, preferring the elder to the younger. The parties accepting the whole must pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction, or in

case of the minority of such party, then to the satisfaction of his guardian; and the true value of the estate must be ascertained and reported by the commissioners. When the commissioners appointed to make partition are of the opinion that the real estate cannot be divided without prejudice or inconvenience to the owners, they must so report to the court, and recommend that the whole be assigned as herein provided, and must find and report the true value of such real estate. On filing the report of the commissioners, and on making or securing the payment as before provided, the court, if it appears just and proper, must confirm the report, and thereupon the assignment is complete, and the title to the whole of such real estate vests in the person to whom the same is so assigned. **Kerr's Cyc. Code Civ. Proc., § 1680.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1906.
- Idaho.*** Code Civ. Proc. 1901, sec. 4287.
- Montana.*** Code Civ. Proc., sec. 2865.
- Nevada.** Comp. Laws, sec. 3011.
- North Dakota.*** Rev. Codes 1905, § 8219.
- Oklahoma.*** Rev. Stats. 1903, sec. 1765.
- South Dakota.*** Probate Code 1904, § 317.
- Utah.*** Rev. Stats. 1898, sec. 3962.
- Washington.** Pierce's Code, § 2687.
- Wyoming.*** Rev. Stats. 1899, sec. 4846.

§ 757. Payments for equality of partition. By whom and how made. When any tract of land or tenement is of greater value than any one's share in the estate to be divided, and cannot be divided without injury to the same, it may be set off by the commissioners appointed to make partition to any of the parties who will accept it, giving preference as prescribed in the preceding section. The party accepting must pay or secure to the others such sums as the commissioners shall award to make the partition equal, and the commissioners must make their award accordingly; but such partition must not be established by the court until the sums awarded are paid to the parties entitled to the same, or secured to their satisfaction. **Kerr's Cyc. Code Civ. Proc., § 1681.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1907.
Idaho.* Code Civ. Proc. 1901, sec. 4288.
Montana.* Code Civ. Proc., sec. 2866.
Nevada. Comp. Laws, sec. 3012.
North Dakota.* Rev. Codes 1905, § 8220.
Oklahoma.* Rev. Stats. 1903, sec. 1766.
South Dakota.* Probate Code 1904, § 318.
Utah.* Rev. Stats. 1898, sec. 3963.
Washington. Pierce's Code, § 2688.
Wyoming.* Rev. Stats. 1899, sec. 4847.

§ 758. **Estate may be sold.** When it appears to the court, from the commissioners' report, that it cannot otherwise be fairly divided, and should be sold, the court may order the sale of the whole or any part of the estate, real or personal, by the executor or administrator, or by a commissioner appointed for that purpose, and the proceeds distributed. The sale must be conducted, reported, and confirmed in the same manner and under the same requirements provided in article four, chapter seven of this title. **Kerr's Cyc. Code Civ. Proc.**, § 1682.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1908.
Idaho.* Code Civ. Proc. 1901, sec. 4289.
Montana.* Code Civ. Proc., sec. 2867.
Nevada. Comp. Laws, sec. 3013.
North Dakota.* Rev. Codes 1905, § 8222.
Oklahoma.* Rev. Stats. 1903, sec. 1767.
South Dakota.* Probate Code 1904, § 319.
Utah.* Rev. Stats. 1898, sec. 3964.
Washington. Pierce's Code, § 2689.
Wyoming. Rev. Stats. 1899, sec. 4848.

§ 759. **Partition. Notice. Duties of commissioners.** Before any partition is made or any estate divided, as provided in this chapter, notice must be given to all persons interested in the partition, their guardians, agents, or attorneys, by the commissioners, of the time and place when and where they shall proceed to make partition. The commissioners may take testimony, order surveys, and take such other steps as may be necessary to enable them to form a judg-

ment upon the matters before them. **Kerr's Cyc. Code Civ. Proc.**, § 1683.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona. Rev. Stats. 1901, par. 1909.
- Idaho.* Code Civ. Proc. 1901, sec. 4290.
- Montana.* Code Civ. Proc., sec. 2868.
- Nevada. Comp. Laws, sec. 3016.
- North Dakota.* Rev. Codes 1905, § 8218.
- Oklahoma.* Rev. Stats. 1903, sec. 1768.
- South Dakota. Probate Code 1904, § 320.
- Utah. Rev. Stats. 1898, sec. 3958.

§ 760. Commissioners to make report, and decree of partition to be recorded. The commissioners must report their proceedings, and the partition agreed upon by them, to the court, in writing, and the court may, for sufficient reasons, set aside the report and commit the same to the same commissioners, or appoint others; and when such report is finally confirmed, a certified copy of the judgment, or decree of partition made thereon, attested by the clerk under the seal of the court, must be recorded in the office of the recorder of the county where the lands lie. **Kerr's Cyc. Code Civ. Proc.**, § 1684.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.* Rev. Stats. 1901, par. 1910.
- Idaho.* Code Civ. Proc. 1901, sec. 4291.
- Montana.* Code Civ. Proc., sec. 2869.
- Nevada. Comp. Laws, sec. 3017.
- North Dakota. Rev. Codes 1905, § 8221.
- Oklahoma.* Rev. Stats. 1903, sec. 1769.
- South Dakota.* Probate Code 1904, § 321.
- Utah. Rev. Stats. 1898, sec. 3959.
- Washington. Pierce's Code, § 2692.
- Wyoming. Rev. Stats. 1899, sec. 4849.

§ 761. When commissioners to make partition are not necessary. When the court makes a judgment or decree assigning the residue of any estate to one or more persons entitled to the same, it is not necessary to appoint commissioners to make partition or distribution thereof, unless the parties to whom the assignment is decreed, or some of them,

ANALOGOUS AND IDENTICAL STATUTES.

Arizona.* Rev. Stats. 1901, par. 1911.
Idaho.* Code Civ. Proc. 1901, sec. 4292.
Montana.* Code Civ. Proc., sec. 2870.
North Dakota. Rev. Codes 1905, § 8213.
Oklahoma.* Rev. Stats. 1903, sec. 1770.
South Dakota.* Probate Code 1904, § 322.
Washington.* Pierce's Code, § 2693.
Wyoming.* Rev. Stats. 1899, sec. 4850.

ANALOGOUS AND IDENTICAL STATUTES.

Arizona.* Rev. Stats. 1901, par. 1912.
Colorado. 3 Mills's Ann. Stats., sec. 4802.
Idaho.* Code Civ. Proc. 1901, sec. 4280.
Montana.* Code Civ. Proc., sec. 2871.
Nevada. Comp. Laws, sec. 3018.
North Dakota.* Rev. Codes 1905, § 8212.
Oklahoma.* Rev. Stats. 1903, sec. 1771.
South Dakota.* Probate Code 1904, § 323.
Utah. Rev. Stats. 1898, sec. 3955.
Washington. Pierce's Code, § 2694.
Wyoming. Rev. Stats. 1899, sec. 4851.

[Title of court.]

This petition, presented by the undersigned, one of the heirs at law of said —, deceased, respectfully represents:

That on the day of —, 19—, letters of administration on the estate of —, deceased, were duly issued to —, and that he, the said —, immediately entered upon his duties as such administrator;

That said estate has been fully administered, and that a petition for distribution has been filed and is now pending therein;

That the property of said estate will vest in and be assigned by decree of distribution, to be made herein, to two or more heirs⁵ hereinafter named, in common and undivided, and the respective shares will not be separated and distinguished by such decree of distribution.

The following are the names and residences of all persons interested in said estate, and the names and residences of all guardians, agents, and attorneys residing in this state, representing any of such persons.

Your petitioner therefore prays that this court make, and cause to be entered, a decree of partition setting off to each person interested in said estate his share thereof in severalty; and that an order be made herein appointing commissioners to make partition and to segregate and assign to each of said heirs⁶ his share of said real estate in severalty, and for such other or further order as may be meet.

—, Attorney for Petitioner. —, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, to the judge, etc., as provided by statute. 4. Or, City and County. 5, 6. Or, devisees or legatees.

§ 764. Form. Order for notice of application for partition on distribution.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

A petition having been filed herein by —, a person interested in the estate of said —, deceased, praying for the partition, and the appointment of commissioners to make partition, of all that portion of the said estate which may be assigned by the decree of distribution herein, in common and undivided, —

It is ordered by the court, That _____,² the _____ day of _____, 19____, at _____ o'clock in the forenoon of said day, at _____, at the court-room of said court,³ be, and they are hereby, appointed as the time and place for the hearing of said petition; and that public notice of the time and place of said hearing be given, by the clerk of this court, to the persons by law required to be notified, by posting notices thereof ' in at least three public places in said county⁵ for at least ten days before said time appointed for hearing.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Day of week. 3. Give location of court-room. 4. Or in such other manner as the court may direct. 5. Or, city and county. The petition for this order cannot be filed by an executor or administrator, because an executor or administrator has no such interest in the land of the deceased as to entitle him to institute partition proceedings: *Ryer v. Fletcher Ryer Co.*, 126 Cal. 482; 58 Pac. Rep. 908. Furthermore, the petition must be filed and notice given before distribution: *Buckley v. Superior Court*, 102 Cal. 6; 41 Am. St. Rep. 135; 36 Pac. Rep. 360.

§ 765. Form. Notice of time of hearing on petition for partition and appointment of commissioners.

[Title of court.]

[Title of proceeding.] { No. _____¹ Dept. No. _____
[Title of form.]

Notice is hereby given: That _____ has filed in this court, in the above-entitled proceeding, his petition praying for partition of the property of said estate among the parties entitled thereto, and for the appointment of commissioners to make such partition.

And further notice is given: That _____,² the _____ day of _____, 19____, at _____ o'clock in the forenoon of said day, at the court-room of said court _____,³ have been fixed by the court as the time and place for the hearing of said petition, when and where all persons interested in said estate may appear and be heard on the matter of the granting of said petition.

_____, Clerk.
Dated _____, 19____. By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Day of week. 3. Give location of court-room, etc.

§ 766. Form. Order appointing commissioners to make partition.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now come ____ and ____, the petitioners applying for partition herein, by ____, their attorney, and prove to the satisfaction of the court that due and legal notice of the said petition, and of the time and place of hearing the same, has been given as required by law and by the order of the court; and the same now coming regularly on for hearing upon the said petition and the records and files herein;² and it further appearing that an order and decree of distribution of said estate has been duly made herein, the court, after hearing the evidence, finds that partition ought to be made herein as hereinafter set forth.

It is therefore ordered by the court, That ____, ____, and ____ be appointed commissioners herein,³ and that, as such commissioners, they proceed, after giving notice as required by law, to make partition and division of the property hereinafter described, and segregate and set off the same in severalty as follows, to wit: To ____ the equivalent of an undivided ____⁴ part thereof; to ____ the equivalent of an undivided ____⁵ part thereof, etc., and that the part allotted to each be ascertained, marked, and described, so that the same can be easily distinguished, and that the partition so made be forthwith reported to this court.

The property to be so partitioned is described as follows, to wit: ____.⁶

Dated ____, 19____. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. If any contest is made, say, "and ____ also appearing by ____, his attorney, in opposition thereto, and the issues being joined." 3. Or, if but one commissioner is appointed, say, "the parties having consented to the appointment of only one commissioner, that ____ be appointed commissioner herein." 4, 5. Designate fractional part. 6. Describe the property. A suit for partition, in a probate court, is a "special proceeding," and minors may be represented by an attorney appointed by the court: *Robinson v. Fair*, 128 U. S. 53; 32 L. ed. 415; 9 Sup. Ct. Rep. 30.

§ 767. Form. Oath to be indorsed on commission.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]State of _____,
County ² of _____, } ss.

_____, _____, and _____, commissioners appointed to make partition of the property of the estate of _____, deceased, being duly sworn, each for himself, and not one for the other, says that he will support the constitution of the United States and the constitution of the state of _____, and that he will faithfully discharge his duties as such commissioner according to law.

Sworn and subscribed to before me this _____ day of _____, 19____, _____, Clerk of the _____ Court.³

By, _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County.
3. Or other officer taking the oath.

§ 768. Form. Report by commissioners, assigning all estate to one interested.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]To the Honorable the _____² Court of the County³ of _____.

We, the undersigned, commissioners appointed by this court to make partition of the real estate of _____, deceased, in pursuance of an order of distribution made and entered herein, having each been sworn to the faithful discharge of his duties before an officer duly authorized to take and administer oaths and to certify the same; and a certified copy of the order appointing us, and of such order of distribution, having been issued to us as our commission⁴ to act; and the oath of each commissioner having been properly certified and indorsed upon such commission, all of which will more fully appear by the said commission annexed hereto, respectfully make report of our proceedings as follows:

That we, in pursuance of due and legal notice given by us to all persons interested in said partition, of the time and

place when and where we would proceed to make such partition, and after hearing the allegations and proofs of said persons, and after viewing said property, find that it cannot be divided without prejudice to the owners thereof; and that —, one of said interested persons, is willing to accept the whole thereof and pay or secure its value.

Hence we recommend that the whole of said real estate be assigned to the said — upon his paying or securing the value thereof as provided by law:

The following is a true description, and statement of the value of each separate parcel of said property: —.⁵

Dated —, 19—.

— }
— } Commissioners.
— }

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Such commission consists of a certified copy of the order of appointment, and of the order or decree assigning or distributing the estate. 5. Give description and value of each parcel.

§ 769. Form. Order confirming report of commissioners, and assigning the whole estate to one.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

The report of —, —, and —, the commissioners heretofore appointed by this court to make partition of the property of the above-named estate, having been filed herein, and it appearing from said report that said commissioners are of the opinion that the real estate of such estate cannot be divided without prejudice or inconvenience to the owners thereof; that the true value of said real estate is — dollars (\$—); and that such commissioners have recommended that the whole estate be assigned to one or more of the parties entitled to share therein, who will accept it; on motion of —, attorney for —, due notice thereof having been given to all persons interested, the court proceeds to hear the parties, and, after due consideration, finds:

That —, one of the parties entitled to share in said estate, will accept the whole thereof, if assigned to him,

and will pay to the other parties interested their just proportion of the true value thereof, or secure the same to their satisfaction: and it appearing to be just and proper that such report should be confirmed, —

It is hereby ordered, That such report be confirmed; and that the whole of said estate be assigned to the said — upon his making or securing the payment to the other parties interested of their just proportion of the true value of such property.

The property so assigned as aforesaid is particularly described as follows, to wit: —.²

Dated — 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Describe the property.

§ 770. Form. Notice by commissioners before partition.

[Title of court.]

[Title of estate.] { No. —¹ Dept. No. —
[Title of form.]

To —, —, and —.²

You are hereby notified: That the undersigned, commissioners heretofore appointed to make partition of the estate above named, will meet at —,³ on —,⁴ the — day of —, 19—, at — o'clock in the forenoon⁵ of said day, to make such partition, at which place and time you may be heard in the premises.

Dated —, 19—.

— }
— } Commissioners.
— }

Explanatory notes. 1. Give file number. 2. Give names of all persons interested in the partition, their guardians, agents, and attorneys. 3. Name the place. 4. Day of week. 5. Or, afternoon.

§ 771. Form. Report, by commissioners, of partition.

[Title of court.]

[Title of estate.] { No. —¹ Dept. No. —
[Title of form.]

To the Honorable the —² Court of the County³ of —.

We, the undersigned, commissioners appointed by this court to make partition of the real estate of —, deceased, in pursuance of an order of distribution made and entered

herein, having each been sworn to the faithful discharge of his duties before an officer duly authorized to take and administer oaths and to certify the same; and a certified copy of the order appointing us, and of such order of distribution, having been issued to us as our commission⁴ to act; and the oath of each commissioner having been properly certified and indorsed upon such commission, all of which will more fully appear by the said commission annexed hereto, respectfully make report of our proceedings as follows:

That we, in pursuance of due and legal notice given by us to all persons interested in said partition, of the time and place when and where we would proceed to make such partition,⁵ and after hearing the allegations and proofs of said persons and viewing said property did make partition of said property as follows:

We assigned to _____ the parcel particularly described as follows, to wit: _____.⁶

We assigned to _____ the parcel particularly described as follows, to wit: _____.⁷

Dated _____, 19____.

_____ } Commissioners.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Such commission consists of a certified copy of the order of appointment, and of the order or decree assigning or distributing the estate. 5. Although the statute does not require any proof of notice by the commissioners, yet, as it does require notice, it would seem proper that either an admission or proof of service of such notice be furnished. 6, 7. Where the payment of money is necessary to equalize the difference in value between parcels respectively assigned, add, after the description in one parcel, "the amount of money to be received by the distributee," and after the description of the other parcel, "the amount of money to be paid by such distributee."

§ 772. Form. Order confirming commissioners' report and directing partition.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

The report of _____, _____, and _____, the commissioners heretofore appointed by this court to make partition of the

property of the above-entitled estate, having been filed herein, and it appearing therefrom that said commissioners have performed their duties as required by law, on motion of —, attorney for —, due notice thereof having been given to all parties interested, —

It is ordered, That said report be, and the same is hereby, confirmed, and that said property be partitioned, as agreed upon by such commissioners, as follows, to wit:—. ²

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Give name of person to whom each parcel is assigned, with description of such parcel, following the partition reported by the commissioners. Asking for partition in the same proceeding by which final settlement and distribution are sought does not render the decree of partition void, if the record shows that the question of partition was not considered until after the decree of final settlement and distribution; and the omission of the names of minor children does not affect jurisdiction, where the petition and order appointing an attorney to represent the minors contain the names of all interested in the proceedings: *Robinson v. Fair*, 128 U. S. 53; 32 L. ed. 415; 9 Sup. Ct. Rep. 30.

§ 773. Form. Decree of partition.

[Title of court.]

[Title of estate.]

{ No. —. ¹ Dept. No. —
[Title of form.]

Now comes —, by —, his attorney, and presents to the court the report of —, —, and —, commissioners appointed by the court to make partition herein, and moves the court to confirm the report accordingly, and shows to the court that notice of the time and place of making the partition so made and reported by said commissioners was given by the said commissioners to all parties interested in said partition as required by law; that notice of the time and place of making said motion has been duly served on the attorneys of record of all parties interested herein; ² and no person appearing to object to said partition, ³ the court, having examined said report and heard the evidence offered, grants said motion, and confirms said partition.

It is therefore ordered, adjudged, and decreed by the court, That said partition, so made by said commissioners,

be confirmed, and that the same be firm and effectual forever between said parties, and that, in accordance therewith, there be vested in _____ in severalty, in lieu of his undivided share of said estate, the property described as follows, to wit: _____.⁴

The property to be so partitioned is described as follows, to wit: _____.⁵

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, has been duly given by posting notice thereof in three of the most public places in this county, or city and county, at least ten days prior to said time. 3. Or, _____ and _____, appearing by _____, their attorney, and filing and presenting their written objections to said report and partition. 4. Describe the property, and proceed with other shares in the same manner. 5. Describe the property.

§ 774. Form. Report, by commissioners, recommending sale.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

To the Honorable the _____² Court of the County³ of _____.

The undersigned, commissioners appointed by this court to make partition of the real estate of _____, deceased, in pursuance of a decree of distribution entered herein, respectfully report:

That, after having received our warrant, consisting of a certified copy of the order of our appointment and of said decree distributing said estate, and having been duly sworn to faithfully discharge our duties, which oath is indorsed on said warrant, and which said warrant and oath are hereto annexed, we gave due and legal notice to all persons interested in said partition, and to the guardians, agents, and attorneys of all so represented, of the time when and place where we would proceed to make such partition; and in pursuance of such notice, after hearing the allegations and proofs of such persons and their representatives, and after viewing said property, we are of the opinion and find that the real estate cannot be divided without prejudice⁴ to the owners

thereof; and that no one of said owners is willing to accept the whole thereof and pay or secure to his co-owners the value of their respective shares; and that said property cannot otherwise be fairly divided and should be sold.

Wherefore we recommend that said real estate be sold and the proceeds distributed among the parties entitled thereto.

Dated —, 19—.

Respectfully submitted.

_____ } Commissioners.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, inconvenience.

§ 775. Form. Order of sale of estate and distribution of proceeds.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

The report of —, —, and —, the commissioners heretofore appointed by this court to make partition of the property of the above-entitled estate, having been filed herein; and it appearing therefrom that the property of said estate cannot be divided without prejudice² to the owners; that no person interested in said estate is willing to take the whole thereof, and make or secure payment as provided by law; and that a sale is necessary to secure a fair and equitable division of said property, —

It is ordered, That the whole of said property be sold, and the proceeds distributed according to law; and that before the making of such sale the administrator³ of said estate file an additional bond in the sum of — dollars (\$—).⁴

The following is a description of the property hereby ordered to be sold: —.⁵

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, inconvenience. 3. Or, executor. 4. Where the statute requires an additional bond. 5. Describe the property.

PARTITION IN CONNECTION WITH DISTRIBUTION.

- | | |
|--|--|
| 1. Partition is authorized only in what cases. | 6. Same. Who entitled to distribution. |
| 2. Limited power of court. | 7. Essentials of decree and conclusiveness of. |
| 3. Petition and proceedings preliminary to decree. | 8. Power of court after decree. Notice. |
| 4. Requirement as to notice. | |
| 5. Limit as to whose interests may be recognized. | |

1. **Partition is authorized only in what cases.** Section 1675 of the Code of Civil Procedure of California, conferring upon the probate department of the superior court power to partition estates held in common and undivided, applies only to cases before the court in which it is possible to set aside property to be held in severalty. Partition necessarily results in the termination of the cotenancy, and vests in each person a sole estate in a specific purparty or allotment of the lands. Partition cannot be made in probate unless the interest of the decedent is an estate in severalty. The probate court is authorized to make partition only in cases of joint tenure. Its action must be confined to a single estate. Under such a statute partition is had only because the land was the property of the decedent, not because it is the land of the heirs. The fact that jurisdiction of all undivided interests of a decedent is given, does not evince a purpose to intrust the court with the power to make partition or allotment of property in which strangers have an interest: *Buckley v. Superior Court*, 102 Cal. 6, 8; 41 Am. St. Rep. 135; 36 Pac. Rep. 360. In statutes concerning the distribution of the estate of a decedent, the word "estate" is clearly used as the equivalent of "distributable assets": *Estate of Hineckley*, 58 Cal. 457, 515.

REFERENCES.

Partition in connection with the distribution of estates of deceased persons: See note 41 Am. St. Rep. 140-151. Advancements: See note 80 Am. Dec. 559-565.

2. **Limited power of court.** The superior court, while sitting as a court of probate, has no other powers than those given to it by statute, and such incidental powers as pertain to it to enable it to exercise the jurisdiction which is conferred upon it. It has no power to determine disputes between heirs and devisees, and strangers, as to the title of property: *Buckley v. Superior Court*, 102 Cal. 6, 8; 41 Am. St. Rep. 135; 36 Pac. Rep. 360. The subject-matter of the jurisdiction of the court in partition, in connection with distribution, is the property of the deceased only, and this jurisdiction cannot be extended, even by consent of all parties interested in the property: *Buckley v. Superior Court*, 102 Cal. 6, 8; 41 Am. St. Rep. 135; 36 Pac. Rep. 360. Probate

courts have power, in connection with, and as ancillary or supplementary to the settlement and distribution of estates, to make partition of undivided real property among the heirs at law of a deceased person: *Robinson v. Fair*, 128 U. S. 53, 86; 32 L. ed. 415; 9 Sup. Ct. Rep. 30. The probate court in California never had jurisdiction to make partition of real estate, except in the course of a settlement of the estates of deceased persons, and for the purpose of distribution to the heirs or devisees of such estates: *Richardson v. Loupe*, 80 Cal. 490, 496; 22 Pac. Rep. 227. If a widow, being the head of a family, dies, leaving children, some of whom are minors, who continue to occupy the homestead, partition of such homestead cannot be made, against the objection of such minor children, before they become of age: *Trumbly v. Martell*, 61 Kan. 703; 60 Pac. Rep. 741.

3. Petition and proceedings preliminary to decree. Under sections 1675 and 1676 of the Code of Civil Procedure of California, partition may be made by three disinterested persons when the estate assigned by the decree of distribution to two or more heirs, devisees, or legatees is common, and the respective shares are not separated. The partition can be ordered on the petition of any person interested in the estate, but said petition must be filed, and the attorneys, guardians, and agents representing absent parties must be appointed and notice be given before the order or decree of distribution is made. The provision that the petition "may" be filed, and notice given at any time before the decree, was evidently intended to mean that the petition "must" be filed before the decree of distribution: *Buckley v. Superior Court*, 102 Cal. 6, 10; 41 Am. St. Rep. 135; 36 Pac. Rep. 360. But an executor or administrator of the estate of a deceased person, though such estate is shown to be insolvent, has no such interest in the land of the deceased as will entitle him to institute an action for the partition thereof: *Ryer v. Fletcher Ryer Co.*, 126 Cal. 482, 485; 58 Pac. Rep. 908.

4. Requirement as to notice. If a petition for the partition of a decedent's real property may be filed at any time after the decree of distribution is entered, it is not apparent how the parties could have notice of the intended proceedings, if they are not required to watch the record for years at their peril. The notice required by section 1676 of the Code of Civil Procedure of California is confined to "all persons interested who reside in this state, or to their guardians, and to the agents, attorneys, or guardian, if any in this state, of such as reside out of this state." Everyone interested in the settlement of an estate is supposed to be before the court, and to take notice of its proceedings; but when the estate has been settled and the interests of all parties have been ascertained by the decree of distribution, and the property has been set over to them absolutely and unconditionally,

without any previous proceedings indicating an intention to divide the property, the jurisdiction of the court is exhausted: *Buckley v. Superior Court*, 102 Cal. 6, 10, 11; 41 Am. St. Rep. 135; 36 Pac. Rep. 360. Sections 1676 and 1683 of the Code of Civil Procedure of California require that notice be given to all parties interested, residing in the state, before the commissioners are appointed or partition is ordered, stating the time, and place, and where the commissioners will proceed to make the partition; but the probate court can inquire only as to who are parties in interest claiming under the decedent, and whether the proper notice has been given to them; and, as it has no jurisdiction of anyone except those interested in the estate, it is clear that it cannot determine whether proper notice has been given to others, and that it cannot bring them within its jurisdiction: *Buckley v. Superior Court*, 102 Cal. 6, 9; 41 Am. St. Rep. 135; 36 Pac. Rep. 360.

5. **Limit as to whose interests may be recognized.** Section 1678 of the Code of Civil Procedure of California is expressly confined to persons who have purchased from heirs, legatees, or devisees an interest in the estate, and then places them simply in the shoes of their grantors in the matter of such partition and distribution: *Richardson v. Loupe*, 80 Cal. 490, 497; 22 Pac. Rep. 227. This section applies particularly to cases of partition between heirs or devisees, where commissioners are appointed to make division, etc.; and merely gives the right to the grantee of an heir or devisee to have the share of his grantor set off to him: *Chever v. Ching Hong Poy*, 82 Cal. 68, 71; 22 Pac. Rep. 1081.

6. **Same. Who entitled to distribution.** The partition can be ordered on the petition of any person interested in the estate, and it is only "parties interested" whom the court will recognize. But the grantee of an heir of the deceased is a person interested in the estate and is entitled, on a distribution thereof, to the share so conveyed to him: *Buckley v. Superior Court*, 102 Cal. 6, 9, 10; 41 Am. St. Rep. 135; 36 Pac. Rep. 360; *Estate of Vaughn*, 92 Cal. 192; 28 Pac. Rep. 221; *Chever v. Ching Hong Poy*, 82 Cal. 68; 22 Pac. Rep. 1081; *Estate of De Castro v. Barry*, 18 Cal. 96; *Demaris v. Barker*, 33 Wash. 200; 74 Pac. Rep. 362, 364. Purchasers from heirs, legatees, or devisees are placed simply in the shoes of their grantors in the matter of the partition and the distribution of the estate: *Richardson v. Loupe*, 80 Cal. 490, 497; 22 Pac. Rep. 227.

7. **Essentials of decree and conclusiveness of.** The county courts of Oregon have no authority to determine what persons are entitled to the realty, and to make partition of the real estate of the decedent: *Hanner v. Silver*, 2 Or. 336, 338. The decree must name the person entitled under the will, or by succession, or their grantees: *Estate of*

Crooks, 125 Cal. 459, 461; 58 Pac. Rep. 89; *Martinovich v. Marsicano*, 137 Cal. 354, 358; 70 Pac. Rep. 459; *Buckley v. Superior Court*, 102 Cal. 6, 9; 41 Am. St. Rep. 135; 36 Pac. Rep. 360. The grantee of an heir or devisee, or any person who claims under an heir or devisee, is bound by the decree as fully as would be the heir or devisee himself if he had not made the conveyance. The provisions of section 1678 extend to the distribution as well as to the partition which is provided in chapter XI of the Code of Civil Procedure of California, being sections 1658-1703½, and render the decree as conclusive upon those to whom the heirs have conveyed the estate as it otherwise would have been upon such heirs, legatees, or devisees, and the decree is equally conclusive whether the estate is distributed to the persons in segregated parts, or in undivided proportions: *William Hill Co. v. Lawler*, 116 Cal. 359, 362; 48 Pac. Rep. 323; *Snyder v. Murdock*, 26 Utah, 233; 73 Pac. Rep. 22.

8. Power of court after decree. Notice. Ordinarily, the court has no power over the property, or the rights of the distributees, after the entry of a decree of distribution of the estate of a deceased person, and courts of equity alone can afford relief; but the statute gives to the court the power to reserve its jurisdiction to proceed beyond the making of the decree so as to make partition and to compel delivery. For this purpose the parties in interest must be kept before the court, and must be given an opportunity to protect themselves in the proceedings looking to a division of their property. There may be a partition in connection with the distribution of the estate, but proceedings indicating an intention to divide the property should be instituted before the distribution, for, after the distribution, the court would have no power over the property, or the rights of the distributees: *Buckley v. Superior Court*, 102 Cal. 6, 11; 41 Am. St. Rep. 135; 36 Pac. Rep. 360.

CHAPTER IV.

AGENTS FOR ABSENT INTERESTED PARTIES. DISCHARGE
OF EXECUTOR OR ADMINISTRATOR.

- § 776. Court may appoint agent to take possession for absentees.
- § 777. Agent to give bond, and his compensation.
- § 778. Unclaimed estate, how disposed of.
- § 779. Account by agent of absentee. Sale of property.
- § 780. Liability of agent on his bond.
- § 781. Certificate to claimant.
- § 782. Final settlement, decree, and discharge.
- § 783. Discovery of property.
- § 784. Form. Order appointing agent to take possession for non-resident distributee.
- § 785. Form. Bond of agent appointed for non-resident distributee.
- § 786. Form. Petition, by agent of non-resident distributee, for sale of unclaimed personal property.
- § 787. Form. Order of sale of personal property in possession of agent for non-resident distributee.
- § 788. Form. County treasurer's receipt to agent for non-resident distributee.
- § 789. Form. Account of agent for non-resident distributee.
- § 790. Form. Verification of account.
- § 791. Form. Report of agent for non-resident distributee.
- § 792. Form. Order directing sale, by agent, of property of non-resident distributee.
- § 793. Form. Order confirming sale of property by agent.
- § 794. Form. Petition claiming money paid into treasury by agent.
- § 795. Form. Certificate entitling claimant to money paid into treasury by agent.
- § 796. Form. Receipt on distribution.
- § 797. Form. Petition for final discharge.
- § 798. Form. Decree of final discharge.

DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

- | | |
|---|--|
| 1. Representative is entitled to when. | 6. Unauthorized procedure on distribution. |
| 2. Prerequisites to discharge. | 7. Effect of discharge. Conclusiveness. |
| 3. Jurisdiction of court until discharge. | 8. Power of court to set aside. |
| 4. What amounts to discharge. | |
| 5. Validity of order. | |

§ 776. **Court may appoint agent to take possession for absentees.** When any estate is assigned or distributed, by a judgment or decree of the court, as provided in this chapter, to any person residing out of, and having no agent in this state, and it is necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose and authorize him to take charge of such estate, as well as to act for such absent person in the distribution; provided, that if such estate be in money when so assigned or distributed, the executor or administrator of such estate may deposit the share of each person, and in the name of said person, as far as known, as designated in said assignment or decree of distribution, with the county treasurer of the county in which said estate is being probated, who shall give a receipt for the same, and be liable upon his official bond therefor; and said receipt shall be deemed and received by the court, or judge thereof, as a voucher in favor of said executor or administrator, with the same force and effect as if executed by such assignee, legatee, or distributee; and said section as amended shall be applicable to any and all estates now pending in which a decree of final discharge has not been granted. **Kerr's Cyc. Code Civ. Proc., § 1691.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1918.
- Idaho.** Code Civ. Proc. 1901, sec. 4293.
- Montana.** Code Civ. Proc., sec. 2880.
- Nevada.** Comp. Laws, sec. 3019.
- New Mexico.** Comp. Laws 1897, sec. 2029.
- North Dakota.** Rev. Codes 1905, § 8229.
- Oklahoma.** Rev. Stats. 1903, sec. 1772.
- South Dakota.** Probate Code 1904, § 324.
- Utah.** Rev. Stats. 1898, sec. 3970.
- Washington.** Pierce's Code, § 2695.
- Wyoming.** Rev. Stats. 1899, sec. 4852.

§ 777. **Agent to give bond, and his compensation.** The agent must execute a bond to the state of California, to be

approved by the court, or a judge thereof, conditioned that he shall faithfully manage and account for the estate. The court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses. **Kerr's Cyc. Code Civ. Proc.**, § 1692.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho. Code Civ. Proc. 1901, sec. 4294.

Montana.* Code Civ. Proc., sec. 2881.

Nevada. Comp. Laws, sec. 3020.

North Dakota. Rev. Codes 1905, § 8230.

Oklahoma. Rev. Stats. 1903, sec. 1773.

South Dakota. Probate Code 1904, § 325.

Utah. Rev. Stats. 1898, sec. 3971.

Washington. Pierce's Code, § 2696.

Wyoming.* Rev. Stats. 1899, sec. 4853.

§ 778. **Unclaimed estate, how disposed of.** When personal property remains in the hands of the agent unclaimed for a year, and it appears to the court that it is for the benefit of those interested, it shall be sold under the order of the court, and the proceeds after deducting the expenses of the sale, allowed by the court, must be paid into the county treasury. When the payment is made, the agent must take from the treasury duplicate receipts, one of which he must file in the office of the auditor, and the other in the court. Where any agent has money in his hands as such agent, and it appears to the court upon the settlement of his account as such agent that the balance remaining in his hands should be paid into the county treasury, the court may direct such payment and upon such agent filing the proper receipt showing such payment, the court shall enter an order discharging such agent and his sureties from all liability therefor. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 505), § 1693.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1919.

Idaho. Code Civ. Proc. 1901, sec. 4295.

Montana. Code Civ. Proc., sec. 2882.

Nevada. Comp. Laws, sec. 3021.
North Dakota. Rev. Codes 1905, § 8231.
Oklahoma. Rev. Stats. 1903, sec. 1774.
South Dakota. Probate Code 1904, § 326.
Utah. Rev. Stats. 1898, sec. 3973.
Washington. Pierce's Code, § 2697.
Wyoming. Rev. Stats. 1899, sec. 4854.

§ 779. Account by agent of absentee. Sale of property.

The agent must render the court appointing him, annually, an account, showing:

1. The value and character of the property received by him, what portion thereof is still on hand, what sold, and for what.
2. The income derived therefrom.
3. The taxes and assessments imposed thereon, for what, and whether paid or unpaid.
4. Expenses incurred in the care, protection, and management thereof, and whether paid or unpaid. When filed the court may examine witnesses and take proofs in regard to the account; and if satisfied from such accounts and proofs that it will be for the benefit and advantage of the persons interested therein, the court may, by order, direct a sale to be made of the whole or such parts of the real or personal property as shall appear to be proper, and the purchase-money to be deposited in the state treasury. **Kerr's Cyc. Code Civ. Proc.**, § 1694.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1920.
Idaho.* Code Civ. Proc. 1901, sec. 4296.
Montana.* Code Civ. Proc., sec. 2883.
North Dakota. Rev. Codes 1905, § 8232.
Oklahoma. Rev. Stats. 1903, sec. 1775.
South Dakota.* Probate Code 1904, § 327.
Utah. Rev. Stats. 1898, secs. 3972, 3973.
Wyoming.* Rev. Stats. 1899, sec. 4855.

§ 780. Liability of agent on his bond. The agent is liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of the

sale as required in the preceding sections, and may be sued thereon by any person interested. **Kerr's Cyc. Code Civ. Proc.**, § 1695.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1921.
- Idaho.*** Code Civ. Proc. 1901, sec. 4297.
- Montana.*** Code Civ. Proc., sec. 2884.
- Nevada.** Comp. Laws, sec. 3022.
- North Dakota.*** Rev. Codes 1905, § 8233.
- Oklahoma.*** Rev. Stats. 1903, sec. 1776.
- South Dakota.*** Probate Code 1904, § 328.
- Washington.** Pierce's Code, § 2698.
- Wyoming.** Rev. Stats. 1899, sec. 4856.

§ 781. **Certificate to claimant.** When any person appears and claims the money paid into the treasury, the court making the distribution must inquire into such claim, and being first satisfied of his right thereto, must grant him a certificate to that effect, under its seal; and upon the presentation of the certificate to him, the controller must draw his warrant on the treasurer for the amount. **Kerr's Cyc. Code Civ. Proc.**, § 1696.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1922.
- Idaho.*** Code Civ. Proc. 1901, sec. 4298.
- Montana.*** Code Civ. Proc., sec. 2885.
- Nevada.** Comp. Laws, sec. 3023.
- North Dakota.*** Rev. Codes 1905, § 8234.
- Oklahoma.*** Rev. Stats. 1903, sec. 1777.
- South Dakota.*** Probate Code 1904, § 329.
- Utah.** Rev. Stats. 1898, sec. 3974.
- Washington.** Pierce's Code, § 2699.
- Wyoming.** Rev. Stats. 1899, sec. 4857.

§ 782. **Final settlement, decree, and discharge.** When the estate has been fully administered, and it is shown by the executor or administrator, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and delivered up, under the order of the court, all the property of the estate to the parties entitled, and performed all the acts lawfully required of him, the court must make

a judgment or decree discharging him from all liability to be incurred thereafter. **Kerr's Cyc. Code Civ. Proc.**, § 1697.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1923.
- Colorado.** 3 Mills's Ann. Stats., sec. 4807.
- Idaho.*** Code Civ. Proc. 1901, sec. 4299.
- Kansas.** Gen. Stats. 1905, § 3050.
- Montana.*** Code Civ. Proc., sec. 2886.
- Nevada.** Comp. Laws, sec. 3024.
- North Dakota.** Rev. Codes 1905, § 8068.
- Oklahoma.*** Rev. Stats. 1903, sec. 1778.
- South Dakota.*** Probate Code 1904, § 330.
- Utah.*** Rev. Stats. 1898, sec. 3965.
- Washington.*** Pierce's Code, § 2700.
- Wyoming.*** Rev. Stats. 1899, sec. 4833.

§ 783. **Discovery of property.** The final settlement of an estate, as in this chapter provided, shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate be discovered, or if it become necessary or proper for any cause that letters should be again issued. **Kerr's Cyc. Code Civ. Proc.**, § 1698.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1924.
- Idaho.** Code Civ. Proc. 1901, sec. 4300.
- Montana.*** Code Civ. Proc., sec. 2887.
- Nevada.*** Comp. Laws, sec. 3025.
- North Dakota.** Rev. Codes 1905, § 8235.
- Oklahoma.*** Rev. Stats. 1903, sec. 1779.
- South Dakota.*** Probate Code 1904, § 331.
- Washington.** Pierce's Code, § 2701.
- Wyoming.*** Rev. Stats. 1899, sec. 4834.

§ 784. **Form. Order appointing agent to take possession for non-resident distributee.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 { [Title of form.]

It appearing to the court from the records and papers on file in this case, and from testimony given before the court

upon settlement of the final account of the administrator² of the said —, deceased, that — is an heir at law of the said deceased; that the said — is a non-resident of this state; and that on the — day of —, 19—, a decree of distribution was duly given, made, and entered herein, by the terms of which the property hereinafter described was distributed to the said —; and it further appearing that the said — has no agent in this state to receive the said property; that said property is of the value of — dollars (\$—), and is in danger of destruction unless protected and preserved; and that it is necessary for an agent to be appointed to take possession and charge of said property for the benefit of the said —, —

It is ordered, That — be, and he is hereby, appointed an agent to take possession and charge of the property hereinafter described for the benefit of the said —, and to act for him in respect to said distribution, upon the said agent's execution of a bond to the state of — in the sum of — dollars (\$—), to be approved by this court, and conditioned that he will faithfully manage and account for such estate.

The following is a description of the property referred to herein: —.³

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., as the case may be. 3. Give description.

§ 785. Form. Bond of agent appointed for non-resident distributee.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

Know all men by these presents: That we, — as principal, and — and — as sureties, are held and firmly bound unto the state of — in the sum of — dollars (\$—), lawful money of the United States of America, to be paid to the said state of —, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of the above obligation is such, that whereas by an order of the ____² court of the county³ of ____, state of ____, duly made and entered on the ____ day of ____, 19____, the above-named principal, ____, was appointed an agent to receive and take charge of the distributive share of ____, one of the distributees of the estate of ____, deceased, and to faithfully manage and account for such estate, for the benefit of such absent distributee, —

Now, therefore, if the said principal shall well and faithfully perform the duties of his said trust and agency, then this obligation is to be void; otherwise to remain in full force and effect.

Dated, signed, and sealed with our seals this ____ day of ____, 19____.

____ [Seal]

____ [Seal]

____ [Seal]

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, city and county. Justification of sureties: See form, § 723, ante.

§ 786. Form. Petition, by agent of non-resident distributee, for sale of unclaimed personal property.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____, State of ____.

Your petitioner respectfully shows to this court:

That on the ____ day of ____, 19____, he was, by an order of this court duly made and entered, appointed an agent to receive and take charge of the distributive share of ____, one of the heirs at law of ____, deceased;

That, in pursuance of said order, he qualified as such agent, is now the duly qualified and acting agent of the said ____, and has in his possession certain personal property so received, particularly described as follows, to wit: ____⁴,

That said personal property has remained in the hands of your petitioner unclaimed for a year; that it is not only unproductive, but is an object of constant expense, and is steadily deteriorating in value;⁵ and

That it is for the benefit of those interested in said personal property that it be sold.

Your petitioner therefore prays that this court order such property to be sold in such manner as it shall deem best for those interested therein.

_____, Attorney for Petitioner. _____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. City and County. 4. Insert description. 5. Or other reasons why it should be sold.

§ 787. Form. Order of sale of personal property in possession of agent for non-resident distributee.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes _____, the petitioner herein, by Mr. _____, his attorney, and shows to the satisfaction of the court that his petition for an order of sale of the personal property remaining in his hands as agent for _____, a non-resident distributee of the estate of _____, deceased, was filed herein on the _____ day of _____, 19____; that said property has remained in the hands of such agent for more than a year last past; that it has not been claimed; and that it is for the benefit of those interested in such personal property that it be sold.

It is therefore ordered, That said personal property, hereinafter described, be sold ² by said agent, after such notice and in such manner as the law provides respecting the sale of personalty by administrators and executors.

The property to be sold as aforesaid is particularly described as follows, to wit: _____.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. At public auction or private sale, as directed.

§ 788. Form. County treasurer's receipt to agent for non-resident distributee.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Received of _____, the duly appointed, qualified, and acting agent of _____, a non-resident distributee of the estate

of —, deceased, the sum of — dollars (\$—), being the proceeds, less expenses, of the sale of his distributive share of such estate heretofore ordered by the —² court of the county³ of —, state of —.

Dated —, 19—.

—, Treasurer of the County⁴ of —.

Explanatory notes. 1. Give file number. 2. Title of court. 3, 4. Or, city and county.

§ 789. Form. Account of agent for non-resident distributee.

[Title of court.]

[Title of estate.] { No. —¹. Dept. No. —
[Title of form.] }

Property Received by —, Agent.

The real property, hereinafter described in Schedule A, attached hereto and made a part of this account, has been received by me, and is of the value of — dollars (\$—). A portion thereof, to wit, —, has been sold for the sum of — dollars (\$—), and the remainder thereof is still on hand.

The personal property, hereinafter described in Schedule B, attached hereto and made a part of this account, has been received by me, and is of the value of — dollars (\$—). A portion thereof, to wit, —, has been sold for the sum of — dollars (\$—), and the remainder thereof is still on hand.

The income derived from said real property amounts to the sum of — dollars (\$—); and the income derived from said personal property amounts to the sum of — dollars (\$—).

Taxes and assessments have been imposed upon said property as shown in Schedule C hereto annexed and made part hereof, all of which taxes and assessments have been paid.

The following expenses, hereinafter described in Schedule D, attached hereto and made a part of this account, have been incurred in the care, protection, and management of said property, and the same have been paid.

Recapitulation.

Amounts Chargeable to Agent.

Real property sold, value of	\$——
Real property less part sold, value of	——
Personal property sold, value of	——
Personal property less part sold, value of	——
Income derived from real property	——
Income derived from personal property	——
Total	\$——

Amounts to be Credited to Agent.

Taxes and assessments paid	\$——
Expenses incurred and paid	——
Total	\$——
Total amount chargeable to agent	\$——
Total amount to be credited to agent	——
Remainder chargeable to agent	\$——

Schedule A.

The following is a particular description of the real property which has come into my hands as agent of —, a non-resident distributee of the above-entitled estate, to wit: —.²

Schedule B.

The following is a particular description of the personal property which has come into my hands as agent of —, a non-resident distributee of the above-entitled estate, to wit: —.³

Schedule C.

The following is an itemized statement of the taxes and assessments which have been levied or imposed on the property of said distributee in my hands: —.⁴

Schedule D.

The following is an itemized statement of expenses incurred and paid by me in the care, protection, and management of the distributive share of —, a non-resident distributee of the estate of —, deceased, which has come into my hands as agent, to wit: —.⁵

Explanatory notes. 1. Give file number. 2, 3. Insert description. 4, 5. Give items and amount.

§ 790. Form. Verification of account.

State of _____,
 County ¹ of _____, } ss.

_____, being duly sworn, deposes and says: That he has read the foregoing account, knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and that as to those matters, he believes it to be true.

Subscribed and sworn to before me this _____ day of _____,
 19____. _____, Notary Public, etc.²

Explanatory notes. 1. Or, City and County. 2. Or other officer taking the oath.

§ 791. Form. Report of agent for non-resident distributee.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
 { [Title of form.]

To the Honorable the _____² Court of the County³ of _____,
 State of _____.

The undersigned, agent of _____, a non-resident distributee of the estate of _____, deceased, respectfully renders the foregoing, his first annual account for the said _____, and reports as follows:

That on the day of his appointment, to wit, on the _____ day of _____, 19____, he took charge of all the real estate and personal property described in the order appointing him;

That he has sold a portion of said real property, to wit, _____, for the sum of _____ dollars (\$_____); and that he has sold a portion of said personal property, to wit, _____, for the sum of _____ dollars (\$_____);

That a net income of _____ dollars (\$_____) has been derived from said real and personal property;

That he has paid state, county, and city taxes on said real and personal property to the amount of _____ dollars (\$_____);

That he has made expenditures on said property, as itemized in Schedules C and D, contained in the account hereinbefore stated;⁴

And that because of _____⁵ it will be for the benefit and advantage of the person interested in such real and personal property that the same be ordered sold by this court, and the purchase-money be deposited in the county treasury.

Wherefore petitioner prays that a day be appointed for the hearing of said account, and that upon said hearing said account be allowed, approved, and settled, and that an order of this court be entered directing the sale of the whole or such parts of the said real and personal property as shall appear to the court proper, and that the purchase-money be deposited in the county treasury.

_____, Agent for Non-Resident Distributee.

_____, Attorney for Agent.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. See § 789, ante. 5. State reasons why sale should be made.

§ 792. Form. Order directing sale, by agent, of property of non-resident distributee.

[Title of court.]

[Title of estate.] { No. ____.¹ Dept. No. ____
[Title of form.] }

Now comes _____, agent of _____, a non-resident distributee of the estate of _____, deceased, and shows to the court that on the _____ day of _____, 19____, he filed, as provided by law, his annual account as such agent, together with a report of his proceedings concerning the property placed in his charge; and the court being satisfied from the examination of witnesses and proofs taken in regard to said account that it will be for the benefit and advantage of the persons interested that all of the property both real and personal in the hands of such agent be sold, —

It is ordered, That the said account be, and the same is hereby, allowed, confirmed, and approved; that the whole of the property hereinafter described, and now in the hands of _____, as such agent, be sold by him at public auction,²

the real property to be sold by him after such notice and in such manner as is provided by law for the sale of real property by executors and administrators, and the personal property to be sold by him after such notice and in such manner as is provided by law for the sale of personal property by executors and administrators; and that said —, the agent aforesaid, report his proceedings under this order to this court.

The property to be sold under this order is particularly described as follows, to wit: —.³

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Or otherwise, as directed. 3. Describe the property.

§ 793. Form. Order confirming sale of property by agent.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

—, agent of —, a non-resident distributee of the estate of —, deceased, having made to this court a return of his proceedings under the order of sale herein, and it being shown to the court that such sale was made in the manner directed by this court, and after such notice as is provided by law; and that, at such sale, — became the purchaser of the property sold, to wit, —, for the sum of — dollars (\$—), he being the highest and best bidder, and the said sum being the highest and best sum bid,—

It is ordered, adjudged, and decreed by this court, That said sale be, and the same is hereby, confirmed, approved, and declared valid;² and that the purchase-money be deposited in the state treasury.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Where personal property is sold. If the sale is of real property, say, "that the said sale be, and the same is hereby, confirmed and approved; that said — execute to said purchaser all proper and legal conveyances of all of said real estate; and that the purchase-money be deposited in the county treasury"; and the order should contain the same recitals required in an order confirming a sale by an executor or administrator.

§ 794. Form. Petition claiming money paid into treasury by agent.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____,
State of ____.

Now comes ____, by his attorney, Mr. ____, and respectfully shows to this court that on the ____ day of ____, 19____, this court, in the matter of said estate, made and entered its decree distributing to your petitioner certain property of the estate of ____, deceased, to wit, ____; ⁴ but that petitioner was not, at the date of said decree, a resident of this state; that thereupon this court, as provided by law, appointed ____ as agent to take charge of said property for petitioner; that, under the direction and order of this court, said ____, on the ____ day of ____, 19____, made a sale of said property, and subsequently, on the ____ day of ____, 19____, deposited the proceeds of such sale in the state⁵ treasury of this state; ⁶ and that your petitioner is the identical person mentioned as the distributee in said decree, and in all proceedings herein subsequent thereto, and is entitled to the money so paid into the treasury of this state.⁷

Your petitioner therefore prays that this court grant him a certificate showing his right to said money.

____, Attorney for Petitioner. ____, Petitioner.

Explanatory notes. 1. Five file number. 2. Title of court. 3. Or, City and County. 4. Give description of both real and personal property. 5. Or, county. 6, 7. Or, county, or city and county.

§ 795. Form. Certificate entitling claimant to money paid into treasury by agent.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It being shown to the court that a decree was made and entered herein on the ____ day of ____, 19____, distributing to ____, a non-resident distributee of the estate of ____,

deceased, certain property of said estate, to wit, ____; that ____ was appointed agent for the said ____ to take charge of said property; that, under the direction and order of this court, the said agent made a sale of said property, and deposited the proceeds of such sale in the state² treasury; and it appearing from the petition of ____ filed herein that petitioner now claims the money so paid into the state³ treasury,—the court proceeds to make inquiry into said claim, and finds that said ____ is the same person mentioned herein by said name; that the said ____ is a distributee of said estate; that the money representing his share of such estate has, after due and legal proceedings, been deposited in the state⁴ treasury; and that the said ____ is entitled to such money.

It is therefore certified and ordered by this court, under its seal, That said ____ has a right to said money, amounting to the sum of ____ dollars (\$____), and is entitled to withdraw the same, and the controller of state⁵ is hereby authorized and directed to draw his warrant therefor in favor of the said ____.

Dated ____, 19____. ____, Judge of the ____ Court.

[Seal] Attest: ____, Clerk of the ____ Court.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2-4. Or, county, auditor, county clerk, or other officer whose duty it is to draw such warrant.

§ 796. Form. Receipt on distribution.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

Received of ____, administrator² of the estate of ____, deceased, the sum of ____ dollars (\$____),³ being in full of my distributive share of said estate.

Dated ____, 19____.

____, Heir at Law⁴ of ____, Deceased.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., according to the fact. 3. Insert description here of any other property received; or, all property distributed to me under decree of distribution in the above-entitled estate, made on the ____ day of ____, 19____. 4. Or, devisee or legatee, according to the fact.

§ 797. Form. Petition for final discharge.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____,
State of ____.

Your petitioner, ____, administrator⁴ of the estate of ____, deceased, respectfully shows to this court: That said estate has been fully administered; that he has paid all sums of money due from him, and has delivered up, under the order of this court, all property of the said estate to the parties entitled thereto; that he has performed all acts lawfully required of him; and that he has filed in this court the vouchers required by law.

Wherefore he prays that he be discharged as such administrator,⁵ and that he be discharged from all liability to be hereafter incurred.

____, Attorney for Petitioner. ____ , Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4, 5. Or, executor, etc., according to the fact.

§ 798. Form. Decree of final discharge.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

____, administrator² of the estate of ____, deceased, having this day shown to this court, by the production of satisfactory vouchers, that he has paid all sums of money due from him, and has delivered up, under the order of this court, all the property of said estate to the parties entitled thereto; that he has performed all the acts lawfully required of him; and that no further acts remain to be performed by him as such administrator,³ —

It is ordered, adjudged, and decreed, That said ____, administrator⁴ of the estate of said ____, deceased, be, and he is hereby, discharged from all liability to be hereafter incurred as such administrator,⁵ and his sureties are likewise released from further liability.

Dated ____, 19____. ____ , Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2-5. Or, executor.

DISCHARGE OF EXECUTOR OR ADMINISTRATOR.

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|---|--|
| 1. Representative is entitled to when. | 6. Unauthorized procedure on distribution. |
| 2. Prerequisites to discharge. | |
| 3. Jurisdiction of court until discharge. | 7. Effect of discharge. Conclusiveness. |
| 4. What amounts to discharge. | 8. Power of court to set aside. |
| 5. Validity of order. | |

1. **Representative is entitled to when.** When it appears upon the settlement of the accounts of the representative, at the end of the year, that the entire property of the estate is exhausted by payment or distribution made as required by the statute, such account shall be considered as a final account, and the executor or administrator shall be entitled to his discharge on producing and filing the necessary vouchers and proofs: *Estate of Isaacs*, 30 Cal. 105, 111. The code does not provide that the discharge can only be made "after" the decree of distribution, but after the estate "has been fully administered"; and there is no reason why the decree of distribution and discharge should not take effect contemporaneously: *Dean v. Superior Court*, 63 Cal. 473, 476, 477. An executor or administrator is not entitled to his discharge until after the estate has been fully administered. He is not entitled to it immediately after the decree of distribution, unless the estate has been settled. Admitting that there must be an order of distribution, however, to support the judgment of discharge, the two may take effect contemporaneously: *Dean v. Superior Court*, 63 Cal. 473, 476. Nor is the mere allowance of the final account the legal equivalent of a decree of discharge. Until the entry of a decree discharging the executor or administrator from liability, he is not discharged from his trust: *McCrea v. Haraszthy*, 51 Cal. 146, 151. The estate is deemed to be pending until the entry of the decree discharging the administrator or executor from all liability, after the production by him of satisfactory vouchers that he has performed all the acts lawfully required of him in the administration of the estate: *Dohs v. Dohs*, 60 Cal. 255, 260.

2. **Prerequisites to discharge.** If property has been distributed by the decree of a probate court, and the executor or administrator has possession thereof, his duty is not ended until he has delivered the property in accordance with the decree, and not till then can he have his discharge: *Wheeler v. Bolton*, 54 Cal. 302, 305. If the representative pays the shares of the distributees to the wrong person, his liability is not affected by the judgment or decree discharging him from all liability to be incurred thereafter: *Bryant v. McIntosh*, 3 Cal. App. 95; 84 Pac. Rep. 440, 441. It is only after the payment and delivery of all the property of the estate to those entitled, and the production of satisfactory proof of the fact, that the representa-

tive is entitled to his final discharge: *Estate of Clary*, 112 Cal. 292, 294; 44 Pac. Rep. 569. When, after the debts have been paid, the balance still remaining has been ordered distributed by the court, the executor or administrator is not entitled to a discharge until he has further accounted to the court for this balance by showing that he has paid or delivered the property to the parties entitled thereto: *McAdoo v. Sayre*, 145 Cal. 344, 349; 78 Pac. Rep. 874. If the representative has been directed to deposit certain money in bank for the use and benefit of an heir, he is not entitled to be released, and his bondsmen discharged, until he has fully complied with the decree of the court: *Ehrngren v. Gronlund*, 19 Utah, 411; 57 Pac. Rep. 268; and, if he has taken deeds to himself as executor or administrator, he must, as a condition precedent to his discharge and the liberation of his bondsmen, execute to the legatees, as tenants in common, quitclaim deeds to the property: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 127.

3. Jurisdiction of court until discharge. Jurisdiction of the probate court over an executor or administrator does not cease until his final discharge: *Estate of Clary*, 112 Cal. 292, 294; 44 Pac. Rep. 569. Until the entry of a judgment or decree discharging the representative, the trust still continues, in contemplation of law, and the representative remains clothed with the duty and authority of his office: *Dean v. Superior Court*, 63 Cal. 473, 475; *Dohs v. Dohs*, 60 Cal. 255, 260. Until final discharge, the probate court retains jurisdiction, not alone of the representative, but of the property of the estate in his hands, and may compel the proper disposition of the latter, in accordance with its decree, by punishing the delinquent trustee, as for contempt: *Estate of Clary*, 112 Cal. 292, 294; 44 Pac. Rep. 569; *Wheeler v. Bolton*, 54 Cal. 302; *Ex parte Smith*, 53 Cal. 204. The probate court does not lose its jurisdiction upon the entry of the decree of distribution: *Estate of Clary*, 112 Cal. 292, 294; 44 Pac. Rep. 569. A decree of distribution is not a mere order for the payment of money, because the representative cannot get his final discharge without showing that he has paid to the heirs all the money in his hands. The court discharges him from his trust upon proof that it has been fully performed, and payment to the heirs happens to be the last duty in the order of time to be performed: *Estate of Kennedy*, 129 Cal. 384, 387; 62 Pac. Rep. 64.

4. What amounts to discharge. An executor or administrator may obtain an order or decree that he has fully accounted for, and paid over to the proper parties the entire residue of the estate, after payment of debts and expenses. Such a decree is called a discharge, and the effect is to exonerate him and his sureties on his bond: *Cook v. Ceas*, 143 Cal. 221, 228; 77 Pac. Rep. 65; but the allowance of a final

account is not a discharge of the representative from his trust. Until the entry of a decree discharging him from liability, he is not discharged from his trust: *McCrea v. Haraszthy*, 51 Cal. 146, 151.

5. Validity of order. A decree discharging an executor or administrator is not void on its face, unless it affirmatively appears therefrom that it was shown to the court that the representative had not complied with the prerequisites to the judgment; but, if it does appear from the decree that it was not shown to the probate court "by satisfactory vouchers" that the executor "had paid all sums due from him," or that it was not shown, to the satisfaction of the court, that he had delivered up all the property of the estate to the persons entitled, etc., the decree, in so far as it attempts to "discharge" the representative, would be void, because in excess of the jurisdiction of the court: *Dean v. Superior Court*, 63 Cal. 473, 475, 476. After settling the account and apportioning the money in the hands of the representative of a decedent, it is error for the court to direct that, "upon the payment into court and to the clerk thereof" of a designated sum by the representative, "the last-mentioned sum is to be paid out and distributed as hereinbefore directed"; and that the "said administrators shall thereupon be entitled to their discharge." The representative, so long as he remains in office, is entitled to retain the assets of the estate in his possession until disposed of to the parties entitled thereto under the direction of the court: *Estate of Sarment*, 123 Cal. 331; 55 Pac. Rep. 1015, 1017.

6. Unauthorized procedure on distribution. An application for final distribution of all the property of a decedent's estate, without bond or security for the debts, cannot be entertained by the court where the real proposition of the petitioner is that all the property be turned over to the distributees, subject to the debts, legacies, and expenses, that the executors be discharged, and that said distributees shall undertake to complete the process of the administration of the estate by paying the said debts, legacies, and expenses. The court has no power, upon petition of the distributees, and over the objection of the creditors, or without their consent, to arrest the course of administration, charge the assets with the lien for the unpaid debts, legacies, and expenses, discharge the administrator from further duties respecting the estate, and deliver the property of the estate to the heirs, residuary legatees, or devisees, burdened only with the sums due, to be paid at the will of the distributees, or when they are compelled to do so by a suit to enforce the lien: *Estate of Washburn*, 148 Cal. 64, 66; 82 Pac. Rep. 671.

7. Effect of discharge. Conclusiveness. The discharge of the representative from the estate he represents separates him from its business.

ness as completely as if he were dead: *Willis v. Farley*, 24 Cal. 490, 502. A decree of the probate court settling an executor's or administrator's final account, and discharging him from his trust, after due, legal notice, and in the absence of fraud, is conclusive upon all matters or items which come directly before the court, until reversed. It will be presumed that such decree was founded upon proper evidence, and that every prerequisite to a valid discharge was complied with. The decree cannot be impeached in any collateral proceeding. It is conclusive, however, only as to matters embraced in the account. It is no bar to the claims of the creditors or heirs, that did not, in any manner, form the subject of it: *Hartsel v. People*, 21 Col. 296; 40 Pac. Rep. 567, 568, quoting from *Black on Judgments*, § 644; and see *Reynolds v. Brumagim*, 54 Cal. 254, 257; *Grady v. Porter*, 53 Cal. 680, 685.

8. **Power of court to set aside.** A probate court has jurisdiction to set aside its order or decree discharging an administrator from his office, upon the ground that such decree had been inadvertently made and entered: *Wiggin v. Superior Court*, 68 Cal. 398; 9 Pac. Rep. 646, 648; *Estate of Noah*, 88 Cal. 468, 472; 26 Pac. Rep. 361. In the state of Washington, a conditional order discharging an executor or administrator is not effective until the order has been made absolute. The court still has jurisdiction of the proceeding, and may set aside the conditional order upon the motion of one who claims that full distribution has not been made: *State v. Superior Court*, 13 Wash. 25; 42 Pac. Rep. 630, 631. After the expiration of the time limited by the statute in which one may petition to be relieved from a judgment taken against him through his "mistake, inadvertence, surprise, or excusable neglect," a decree settling the final account of the representative of a decedent, and discharging him from his trust, if regular upon its face, cannot be set aside by the probate court on the ground that it had been inadvertently and prematurely entered, or on the ground of fraud. The remedy in such cases is exclusively in equity: *Dean v. Superior Court*, 63 Cal. 473, 477; *Estate of Cahalan*, 70 Cal. 604, 607; 12 Pac. Rep. 427. A writ of prohibition is not the proper remedy to correct an inadvertent order or decree discharging an executor or administrator from his office: *Wiggin v. Superior Court*, 68 Cal. 398; 9 Pac. Rep. 646, 648.

CHAPTER V.

ACCOUNTS OF TRUSTEES. DISTRIBUTION.

- § 799. Superior court not to lose jurisdiction by final distribution.
- § 800. Compensation of trustees.
- § 801. Appeal from decree settling account of trustee.
- § 802. Trustee under will may decline. Resignation of executor. Appointment by court.
- § 803. Form. Petition for appointment of trustee under will.
- § 804. Form. Order appointing trustee.
- § 805. Form. Order accepting resignation of testamentary trustee.
- § 806. Jurisdiction.
- § 807. Distribution of estate. Deposit with county treasurer when.

TRUSTS UNDER WILLS, TESTAMENTARY TRUSTEES, AND
DISTRIBUTION TO TRUSTEES.

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| <ul style="list-style-type: none"> 1. Trusts under wills. <ul style="list-style-type: none"> (1) In general. (2) Creation of trusts. (3) Construction of trusts. (4) Judgment construing trust. (5) Law of situs governs. (6) Validity of trust. (7) Void trusts. 2. Probate jurisdiction of trusts. <ul style="list-style-type: none"> (1) To determine whether valid trust has been created. (2) Retention of, for purpose of settling accounts. (3) Exclusiveness of jurisdiction. (4) To determine what questions. (5) Over trustees, to prevent mismanagement. 3. Executor and testamentary trustee. <ul style="list-style-type: none"> (1) Object of law. (2) Testamentary trustees. In general. (3) Executors who are trustees under will. Distinct and separate capacities. (4) Duty, power, and liability of testamentary trustee. (5) Duties of trustee cannot be assumed until when. | <ul style="list-style-type: none"> (6) Duty of testamentary trustee before distribution. (7) Discharge of executor acting as trustee. (8) Trust with power to sell under will. (9) Testamentary guardians. 4. Jurisdiction in equity. 5. Jurisdiction. Sale by trustees. 6. Discretionary trusts. 7. Devises in trust. 8. Purposes of trust communicated orally. 9. Accounting. <ul style="list-style-type: none"> (1) Distinction between accounts. (2) Duty and liability to account. (3) Involves what determination. Power of court. (4) Calling trustees to account. (5) Compensation of trustee. 10. Distribution to trustees. <ul style="list-style-type: none"> (1) Power of court. (2) Effect and validity of decree. (3) On death, trust devolves on whom. 11. Discharge of trustees. |
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§ 799. Superior court not to lose jurisdiction by final distribution. Where any trust has been created by or under any will to continue after distribution, the superior court shall

not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trusts. And any trustee created by any will, or appointed to execute any trust created by any will, may, from time to time, pending the execution of his trust, or may, at the termination thereof, render and pray for the settlement of his accounts as such trustee, before the superior court in which the will was probated, and in the manner provided for the settlement of the accounts of executors and administrators.

[Settlement of account of trustee. How made.] The trustee, or, in the case of his death, his legal representatives, shall, for that purpose, present to the court his verified petition, setting forth his accounts in detail, with a report showing condition of trust estate, together with a verified statement of said trustee, giving the names and post-office addresses, if known, of the cestuis que trust, and, upon the filing thereof, the court, or judge, shall fix a day for the hearing. The clerk must thereupon give notice thereof of not less than ten days, by causing notices to be posted in at least three public places in the county, setting forth the name of the trust estate, the trustee, and the day appointed for the settlement of the account. The court, or a judge thereof, may order such further notice to be given as may be proper. Such trustee may, in the discretion of the court, upon application of any beneficiary of the trust, or the guardian of such beneficiary, be ordered to appear and render his account, after being cited by service of citation, as provided for the service of summons in civil cases, and such application shall not be denied where no account has been rendered to the court within six months prior to such application. Upon the filing of the account so ordered, the same proceedings for the hearing and settlement thereof shall be had as hereinabove provided. **Kerr's Cyc. Code Civ. Proc., § 1699.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho. Code Civ. Proc. 1901, sec. 4201.

Montana. Code Civ. Proc., sec. 2900.

Utah. Rev. Stats. 1898, sec. 3977.

§ 800. Compensation of trustees. On all such accountings the court shall allow the trustee or trustees the proper expenses and such compensation for services as the court may adjudge to be just and reasonable, and shall apportion such compensation among the trustees according to the services rendered by them respectively, and may in its discretion fix a yearly compensation for the trustee or trustees to continue as long as the court may judge proper. **Kerr's Cyc. Code Civ. Proc.**, § 1700.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho. Code Civ. Proc. 1901, sec. 4302.

Montana.* Code Civ. Proc., sec. 2901.

Utah. Rev. Stats. 1898, sec. 3978.

§ 801. Appeal from decree settling account of trustee. From a decree settling such account appeal may be taken in the manner provided for an appeal from a decree settling the account of an executor or administrator. The decree of the superior court, if affirmed on appeal or becoming final without appeal, shall be conclusive. **Kerr's Cyc. Code Civ. Proc.**, § 1701.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Code Civ. Proc. 1901, sec. 4303.

Montana.* Code Civ. Proc., sec. 2902.

§ 802. Trustee under will may decline. Resignation of executor. Appointment by court. Any person named or designated as a trustee in any will which has been or shall hereafter be admitted to probate in this state may, at any time before final distribution, decline to act as such trustee, and an order of court shall thereupon be made accepting such resignation;

[**Executor, resignation of, to be in writing.**] But the declination of any such person who has qualified as executor shall not be accepted by the court, unless the same shall be in writing and filed in the matter of the estate in the court in which the administration is pending, and such notice shall

be given thereof as is required upon a petition praying for letters of administration.

[Appointment of trustee or executor by court.] The court in which the administration is pending shall have power at any time before final distribution to appoint some fit and proper person to fill any vacancy in the office of trustee under the will, whether resulting from such declination, removal, or otherwise; provided, it shall be required by law or necessary to carry out the trust created by the will, that such vacancy shall be filled; and every person so appointed shall, before acting as trustee, give a bond such as is required by section one thousand three hundred and eighty-eight of this code, of a person to whom letters of administration are directed to issue.

[Same. Upon written application of person interested.] Such appointment may be made by the probate judge upon the written application of any person interested in the trust filed in the probate proceedings, and shall only be made after notice to all parties interested in the trust, given in the same manner as notice is required to be given of the hearing upon the petition for the probate of a will. In each of the preceding cases the court may order such further notice as shall seem necessary. In accepting a declination under the provisions of this section, the court may make and enforce any order which may be necessary for the preservation of the estate. This section shall be applicable to any and all estates now pending in which a final distribution and discharge has not been granted. **Kerr's Cyc. Code Civ. Proc.**, § 1702.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Kansas. Gen. Stats. 1905, § 8734.

§ 803. **Form. Petition for appointment of trustee under will.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____

The petition of ____ respectfully shows:

That he is interested in the trust created by the last will of said —, deceased, which will was duly admitted to probate herein on the — day of —, 19—, and petitioner is a beneficiary named in said trust; ⁴

That —, the trustee named in said will to execute said trust died ⁵ on or about the — day of —, 19—, and there is now a vacancy in the office of trustee under said will;

That it is necessary, ⁶ in order to carry out the trust created by said will, that said vacancy be filled, and a trustee be appointed in place of said —, deceased, ⁷ as above stated;

That — is a fit and proper person to fill the office of trustee under said will and is willing to accept the position and perform the duties of such trustee.

Wherefore petitioner prays that, after due notice given, a hearing be had hereon, and an order be made appointing said — trustee to carry out the provisions of the above-named trust, and for such other or further order as may be meet.

Dated —, 19—.

—, Petitioner.

—, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or show the interest of the petitioner. 5. Or, resigned as trustee, or removed from the state. 6. Or, will be required by law. 7. Or, resigned, or removed.

§ 804. Form. Order appointing trustee.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

Now comes —, a person interested in the trust created by the last will of said deceased, and shows to the court that on the — day of —, 19—, he filed his application for the appointment of — ² as trustee herein; that thereupon the clerk appointed the — day of —, 19—, as the day for hearing said application; and that due notice of said hearing has been given to all parties interested in said trust, as required by law and by the order of the court; ³ and

tribution has not been made; but the jurisdiction given by said section shall not exclude, in cases to which it applies, the jurisdiction now possessed by the courts of this state. **Kerr's Cyc. Code Civ. Proc.**, § 1703.

§ 807. Distribution of estate. Deposit with county treasurer when. When any estate is distributed by the judgment or decree of the court or a judge thereof, as provided in this chapter, to a distributee who cannot be found and his or her place of residence is unknown, or to a minor or incompetent person, who has no lawful guardian to receive the same, or person authorized to receipt therefor, the portion of said estate consisting of money shall be paid to and deposited with the county treasurer of the county in which the estate is being probated, who shall give a receipt for the same, and shall be liable on his official bond therefor; and said receipt shall be deemed and received by the court or judge thereof as a voucher in favor of said executor or administrator, with the same force and effect as if executed by the distributee thereof. And this section shall be applicable to any and all estates now pending in which a final decree of discharge has not been granted. Said moneys so paid into the county treasury, shall be paid out upon petition to, and the order of the superior court or judge thereof to the person entitled to receive the same. **Kerr's Cyc. Code Civ. Proc.**, § 1703 $\frac{1}{2}$.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Kansas. Gen. Stats. 1905, § 3051.

TRUSTS UNDER WILLS, TESTAMENTARY TRUSTEES, AND DISTRIBUTION TO TRUSTEES.

1. Trusts under wills.

- (1) In general.
- (2) Creation of trusts.
- (3) Construction of trusts.
- (4) Judgment construing trust.
- (5) Law of situs governs.
- (6) Validity of trust.
- (7) Void trusts.

2. Probate jurisdiction of trusts.

- (1) To determine whether valid trust has been created.
- (2) Retention of, for purpose of settling accounts.
- (3) Exclusiveness of jurisdiction.
- (4) To determine what questions.

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| (5) Over trustees, to prevent mismanagement. | 4. Jurisdiction in equity. |
| 3. Executor and testamentary trustee. | 5. Jurisdiction. Sale by trustees. |
| (1) Object of law. | 6. Discretionary trusts. |
| (2) Testamentary trustees. In general. | 7. Devises in trust. |
| (3) Executors who are trustees under will. Distinct and separate capacities. | 8. Purposes of trust communicated orally. |
| (4) Duty, power, and liability of testamentary trustee. | 9. Accounting. |
| (5) Duties of trustee cannot be assumed until when. | (1) Distinction between accounts. |
| (6) Duty of testamentary trustee before distribution. | (2) Duty and liability to account. |
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| (8) Trust with power to sell under will. | (4) Calling trustees to account. |
| (9) Testamentary guardians. | (5) Compensation of trustee. |
| | 10. Distribution to trustees. |
| | (1) Power of court. |
| | (2) Effect and validity of decree. |
| | (3) On death, trust devolves on whom. |
| | 11. Discharge of trustees. |

1. Trusts under wills.

(1) **In general.** The subject of trusts is not within the scope of this work. That will be found discussed in the annotations to **Kerr's Cyc. Civ. Code**, §§ 2250-2289. It is our purpose here simply to discuss trusts under wills, and the limited jurisdiction of the probate court respecting the same as conferred by the California Code of Civil Procedure, §§ 1699-1703½. The author of a trust may devise property subject to the execution of the trust, and such a devisee acquires a legal estate in the property as against all persons except the trustee: *Estate of Barclay*, 35 Cal. Dec. 112, 115 (Jan. 24, 1908). A decree in an action to close and settle a trust respecting lands does not affect the independent interest of a widow in such land as a tenant in common: *Estate of Kennedy*, 120 Cal. 458, 463; 52 Pac. Rep. 820. A bequest to be held in trust for the benefit of children until they reach the age of 25 years is not a trust void for undue suspension of the power of alienation, under the statute providing that the power of alienation shall not be suspended beyond the existence of lives in being: *Estate of Hendy*, 118 Cal. 656; 50 Pac. Rep. 753. A trust created by a will, to continue during the lives of persons in being at the time, is not forbidden under the provisions of the statute relating to perpetuities and "trusts to convey," but is valid: *Estate of Lux*, 149 Cal. 200; 85 Pac. Rep. 147, 149. A bequest giving and bequeathing to a designated person as follows: "I give and bequeath to Rev. James Collins for mass for his grandfather's and grandmother's souls," is a gift direct, with the performance of a duty

enjoined. It is not a void trust, nor uncertain as to the beneficiaries, and is not repugnant to the law against bequests for "superstitious uses": *Harrison v. Brophy*, 59 Kan. 1; 51 Pac. Rep. 883.

REFERENCES.

Effect of trust upon death of donor, without exercising power of revocation: See note 6 Am. & Eng. Ann. Cas. 189. Effect of executor's promise, as to payment of legacy, upon trust relations with legatee: See note 9 L. R. A. (N. S.) 214-216.

(2) **Creation of trusts.** In general, every person competent to make a will, to enter into a contract, or to hold a legal title to property has the power to create a trust, even in himself, and to dispose of his property in that way: *Skeen v. Marriott*, 22 Utah, 73; 61 Pac. Rep. 296. No particular form or expression in a will is necessary to constitute a valid trust. It is sufficient that, from the language used, the intention of the testator is apparent, and that the disposition of the trust which he endeavors to make of his estate is consistent with the rules of law. The intent of the testator is the matter for primary consideration, and it is immaterial what method of expression is employed, so long as that intention can be ascertained: *Estate of Heywood*, 148 Cal. 184; 82 Pac. Rep. 755, 757; *Estate of Walker*, 149 Cal. 214, 217; 85 Pac. Rep. 310, 311. An acknowledgment of a trust, with specific reference to the will creating it, and from which the terms of the trust can be ascertained, is sufficient to create a voluntary trust, and the executor who holds the control of the funds creating such trust is estopped from disputing the receipt of the money as a trustee: *Elizalde v. Elizalde*, 137 Cal. 634, 636; 66 Pac. Rep. 369; 70 Pac. Rep. 861. A trust may be created in a will to "manage" property, and to collect the income, issues, and profits thereof, and to pay them to specified persons: *Estate of Heywood*, 148 Cal. 184; 82 Pac. Rep. 755, 757. But, where property is devised absolutely to devisees named, a mere direction in the will to the executors "to invest the proceeds," without mentioning any trust or trustee, other than such as would arise out of the office of executor, does not create a trust, and the court has no power or jurisdiction to carve out a trust from the will: *McCloud v. Hewlett*, 135 Cal. 361, 367; 67 Pac. Rep. 333. So where the testator has not devised land to his executors in trust for the purposes of his will, but has merely given them certain directions to be observed in carrying out its provisions, the will does not create an express trust in real property: *Estate of Pforr*, 144 Cal. 121, 125; 77 Pac. Rep. 825. A devise in a will to the members of a church in trust for their benefit, "whether it be for schools, parks, watering cities, planting forests, acclimatizing foreign plants, or anything else whereby the members may be benefited," is a valid trust. The persons to be benefited are

distinguished therein and are identified by their church membership: *Staines v. Burton*, 17 Utah, 331; 53 Pac. Rep. 1015. Construction of will as reposing in the mother a trust created for the purpose of protecting and preserving the property for the use of the daughter as devisee, without otherwise limiting or decreasing her title thereto, and not for the purpose of affecting the ownership: See *Kinthead v. Maxwell*, 75 Kan. 50; 88 Pac. Rep. 523, 525. Creation, by will, of valid devises and bequests of real and personal property in trust, with designation of particular powers of trustees: See *Estate of Dunphy*, 147 Cal. 95; 81 Pac. Rep. 315, 316. A direction to the executors of a will to collect the rents and to maintain the estate for two years is not a restraint upon its alienation during that period, nor is the provision for its sale at the expiration of two years a prohibition against its sale prior to that time: *Estate of Pforr*, 144 Cal. 121, 126; 77 Pac. Rep. 825.

REFERENCES.

Effect of creation of testamentary trust for payment of debts: See note 5 L. R. A. (N. S.) 355-372. Necessity of word "heirs," in deed or devise in trust, to pass fee to trustee: See note 2 L. R. A. (N. S.) 172-183. Precatory trusts, general rule as to creation of: See note 2 Am. & Eng. Ann. Cas. 593.

(3) **Construction of trusts.** In ascertaining the intention of the testator as to the source from which payments under a trust created by will shall be made, the court is not restricted solely to an examination of the particular subdivisions of the will concerning such payments. Resort may be had to all the provisions of the will which tend to disclose his intention in that particular: *Estate of Heywood*, 148 Cal. 184; 82 Pac. Rep. 755, 757. A trust to "manage" property implies, by force of the term used, that the trustees are to retain it under their control, and is inconsistent with the idea that they have authority to sell or otherwise to dispose of it: *Goad v. Montgomery*, 119 Cal. 552, 560; 63 Am. St. Rep. 145; 51 Pac. Rep. 681; and see *Estate of Heywood*, 148 Cal. 184; 82 Pac. Rep. 755, 757. A clause in the will providing for the payment of annuities, as soon as the trustees shall have sufficient funds available for that purpose, is to be construed as relating only to the date when the annuities begin to run: *Crew v. Pratt*, 119 Cal. 131, 137; 51 Pac. Rep. 44. Where the legal title to land is vested in the trustee, who is "to have and hold" and "manage" the property during the continuance of the trust which is not to vest in the beneficiaries until the happening of a future event named, the trustee is authorized to receive the rents and profits, whatever may be the right of the beneficiaries at the termination of the trust to the accumulated incomes, should there be any: *Blackburn v. Webb*, 133 Cal. 420; 65 Pac. Rep. 952, 953. The language of a will setting aside a trust fund must govern the intention

of the testator, and if the intention cannot be ascertained from the will itself, resort must be had to the recognized rules of interpretation in such cases; but, where the testator, by the same clause of the will, disposes of the income after the death of a trustee, and finally of the fund itself, this bequest is complete in itself, and has no dependence on any other portion of the will for its construction or execution, where the language used by the testator is too plain to admit of construction: *Morse v. Macrum*, 22 Or. 229; 29 Pac. Rep. 615. In an action to construe a will in which the testator gave to his said "executors" all his "property real and personal," etc., but used the qualifying words, "in trust, nevertheless, to and for the following uses and purposes," etc., it was held that the devise was in trust to the executors, not as executors, but purely and simply as trustees: *Smith v. Smith*, 15 Wash. 239; 46 Pac. Rep. 249, 250. Construction of devises to trustees in general and use of the phrase "to transfer and convey," in making a testamentary devise: See *Estate of Fair*, 132 Cal. 523; 64 Pac. Rep. 1000, 1003.

(4) **Judgment construing trust.** A judgment and decree construing a trust created by will is final and conclusive upon all parties then before the court: *Toland v. Earl*, 129 Cal. 152; 61 Pac. Rep. 914; 79 Am. St. Rep. 100; and where a trust is accepted, and the fund is segregated and may be identified, the trust, upon the death of such person, devolves upon his personal representatives: *Kauffman v. Foster*, 3 Cal. App. 741, 745; 86 Pac. Rep. 1108; *Tyler v. Mayre*, 95 Cal. 160; 27 Pac. Rep. 160; 30 Pac. Rep. 196.

(5) **Law of situs governs.** The validity of a trust in real estate, attempted to be created by will, must be determined by the law of the situs of the real estate: *Campbell-Kawannanako v. Campbell* (Cal.), 92 Pac. Rep. 184, 188. See *Penfield v. Tower*, 1 N. D. 216; 46 N. W. Rep. 413.

(6) **Validity of trust.** It is the universally accepted rule that the title and disposition of real estate is governed by the *lex loci rei sitae*. This necessarily includes the proposition that the validity of a trust in real estate attempted to be created by a will must be determined by the law of the situs of the real estate: *Campbell-Kawannanako v. Campbell* (Cal.), 92 Pac. Rep. 184, 186; *Penfield v. Tower*, 1 N. D. 216; 46 N. W. Rep. 413. Where a trust over absolutely depends upon a trust to convey, the trust to convey being invalid, the trust over must fall with it; and where real and personal property are all part and parcel of the trust scheme, and the trust as to real property is invalid, and there is nothing in the record to show that money, which is the subject of the trust, is not the accumulation of the real estate, the trust is void as to all of the property: *Estate of Dixon*, 143 Cal.

511; 77 Pac. Rep. 412, 413. It is only when the language actually used by the testator will admit of no other reasonable construction than that it creates an invalid trust, that a court will declare this to be its effect: *Estate of Heywood*, 148 Cal. 184, 191; 82 Pac. Rep. 755, 758. A trust in a will will not be declared invalid because a large discretion is vested in the trustee. Where a testamentary trust authorized a trustee, who was the husband of the testatrix, to sell the property of the estate, and to invest the proceeds as he might deem best, and to appropriate so much of the estate to the education and maintenance of the children of the testatrix as the trustee might deem necessary, and also provided that no bond should be required of the trustee; that no report of his doings should be made to the court; and that he should have full power to sell and to dispose of the trust property as his judgment might dictate, so long as the proceeds should be applied to the purposes of the trust; such provisions furnish no reason for declaring the trust invalid: *Keeler v. Lauer*, 73 Kan. 388; 85 Pac. Rep. 541, 543. The will should not be construed as creating an illegal trust by implication. An illegal trust must clearly and necessarily appear before the will, for such reason, can be upset: *Estate of Dunphy*, 147 Cal. 95; 81 Pac. Rep. 315, 318. It is settled by the great weight of authority in America that the author of a trust to pay, or to apply for the benefit of another, the income of property, or a portion of such income, may lawfully provide that the interest of the beneficiary shall not be assignable, or shall not be subject to the claims of his creditor; and such provision need not be expressed, but may be implied from the general intention of the donor, to be gathered from the terms of the trust in the light of all the circumstances: *Seymour v. McAvoy*, 121 Cal. 438, 442; 53 Pac. Rep. 946, 947.

(7) **Void trusts.** A trust in a will which suspends the power of alienation for any fixed period of years, not depending upon the duration of life, is void, however short the period may be, because, during the time of such limitation, the persons capable of conveying the interest might die: *Crew v. Pratt*, 119 Cal. 139, 147; 51 Pac. Rep. 38. In California a trust in a will which prohibits the suspension of the power of alienation for a longer period than during the continuance of lives in being at the time of the death of the testator, is void in its creation as to real property situated within that state. So a trust in a will which devises the title to real property in fee simple to the trustees to be conveyed by them to the beneficiaries is also void: *Campbell-Kawannanako v. Campbell (Cal.)*, 92 Pac. Rep. 184, 185. Where the creation of a trust as to real property is attempted in a will, but such trust is void in its creation, and there are no apt words in the will disposing of the property upon the failure of such trust, intestacy as to the property must be the result: *Estate*

of Heberle (Cal.), 95 Pac. Rep. 41, 42. A trust to convey real estate to beneficiaries named, or which attempts to illegally restrict the power of alienation, is void from its creation: Estate of Heberle (Cal.), 95 Pac. Rep. 41, 42; Estate of Walkerly, 108 Cal. 628; 41 Pac. Rep. 772; 49 Am. St. Rep. 97; Estate of Cavarly, 119 Cal. 408; 51 Pac. Rep. 629; Estate of Fair, 132 Cal. 523; 60 Pac. Rep. 442; 64 Pac. Rep. 1000; 84 Am. St. Rep. 70; Estate of Dixon, 143 Cal. 511; 77 Pac. Rep. 412; Estate of Sanford, 136 Cal. 97; 68 Pac. Rep. 494. Where a devise of property to trustees is made by a will, "to transfer and convey," etc., and provides no way by which the property may vest in any other person, except by a conveyance by said trustees; and, moreover, the testator clearly expresses his intent that it should so vest only by a conveyance by the trustees, such trust is invalid and void under the laws of California: Estate of Fair, 132 Cal. 523, 533; 60 Pac. Rep. 442; 64 Pac. Rep. 1000; 84 Am. St. Rep. 70 (Temple J., Harrison J., and Beatty J., dissenting and maintaining that the devisees under such a will are the donees of a power in trust to convey the property when the trust estate ends, and that while a trust to convey cannot be created, such a power in trust is perfectly valid). If real property is devised to trustees, and the will clearly contains a trust to convey such property to designated persons, and there is no devise to such persons, the will is invalid, and the property, not being disposed of by the will, vests at the death of the testator in the heirs at law, and should be distributed to them: Estate of Pichoir, 139 Cal. 682, 685; 73 Pac. Rep. 606.

2. Probate jurisdiction of trusts.

(1) **To determine whether valid trust has been created.** It is within the province of a probate court to determine whether a valid trust has been created by will, but the power to regulate and direct its subsequent administration lies with the court possessed of general equity jurisdiction: Estate of Hinckley, 58 Cal. 457, 518; Morffew v. San Francisco etc. R. R. Co., 107 Cal. 587, 594; 40 Pac. Rep. 810. When a trust vests, under the will, in the trustees, although they are named as executors, they are subject to equity and not to probate jurisdiction: Jasper v. Jasper, 17 Or. 590; 22 Pac. Rep. 152, 155.

(2) **Retention of, for purpose of settling accounts.** By section 1699 of the Code of Civil Procedure of California, jurisdiction is retained by the superior court "for the purpose of the settlement of accounts under the trusts," where the trust created by will continues after the distribution. "Pending the execution of his trust," or at its determination, the trustee may "render and pray for the settlement of his accounts as such trustee, before the superior court in which the will is probated": McAdoo v. Sayre, 145 Cal. 344, 350; 78 Pac. Rep. 874; Estate of O'Connor, 2 Cal. App. 470; 84 Pac. Rep. 317. The probate

court retains jurisdiction, however, only for the one purpose of settling the accounts of the trustees. It was no doubt intended by the legislature that the trustees, without any independent proceeding, or without being called upon by the beneficiaries, might file their accounts in the court in which the estate was administered and have it settled as a matter of convenience: *Mackay v. San Francisco*, 128 Cal. 678, 684; 61 Pac. Rep. 382. The statute provides that the report accompanying the account must give the names and post-office addresses, if known, of the cestuis que trust. But if the report fails to do this, a writ of prohibition will not lie to prevent further action of the court on the ground that the proceeding is void. An appeal lies from any order that may be made in the proceeding, and it will furnish a sufficient remedy to any person, aggrieved by the action of the court, in attempting to proceed without jurisdiction: *McAdoo v. Sayre*, 145 Cal. 344, 350; 78 Pac. Rep. 874.

(3) **Exclusiveness of jurisdiction.** A court of equity cannot remove a person who is named as executor, and also as trustee under a will, from the executorship, for courts of probate have exclusive jurisdiction over the appointment and removal of administrators and executors: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 515. When a person has been appointed by a testator to execute the requests of a will, and has also been vested by such testament with an interest or a power over the property which, after the testator's death, he is to perform for the benefit or to the use of another, it seems that the probate tribunal alone has jurisdiction: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 121; *McAdoo v. Sayre*, 145 Cal. 344; 78 Pac. Rep. 874; *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317; but see *Mackay v. San Francisco*, 128 Cal. 678, 685; 61 Pac. Rep. 382. When an executor lawfully secures possession of the property of a decedent's estate, any intermeddling therewith by a testamentary trustee, until the executor has been discharged, may be regarded by the probate court as the usurpation of its authority; for, as the testator's debts, funeral expenses, etc., must be paid before any trust can attach to the property, under a devise or bequest thereof, the jurisdiction of such court necessarily precedes that of an equity tribunal, and is therefore exclusive: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 121.

(4) **To determine what questions.** In the settlement of a trustee's account, where the same person is named as trustee in the will, and is also the executor thereof, the probate court, having been invested by statute with a limited equitable jurisdiction, has the power, and it is its duty, whenever the power is invoked, to ascertain who is entitled to the trust estate already delivered by the trustee, and also that which yet remains to be delivered, and to make such orders as may be necessary to enable the trustee to make final settlement with the benefi-

ciary, in safety, and to secure a final settlement of his account which will entitle him to a discharge: *McAdoo v. Sayre*, 145 Cal. 344, 350; 78 Pac. Rep. 874, 876; *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317. The executors named as trustees in the will of deceased hold the property of the estate as executors until distribution thereof, and must account to the probate court for all property of the estate of said deceased received by them as such executors, and for their management of the same prior to distribution under the will of deceased; and it is for the court to determine what, if any, commissions they are entitled to receive for their services as executors of the will, and also to determine, in the settlement of their accounts, what moneys were properly expended by them in the discharge of their duties, and so chargeable to the estate represented by them, and whether they have exercised ordinary care in the management of the property of said estate, or whether they have mismanaged the same, or permitted waste thereof. It is also a question solely for the consideration of the probate court, whether an attorney should be appointed to represent absent or minor heirs, and, if so appointed, the amount of compensation to be allowed. That court also has jurisdiction to make an order setting apart a homestead for the widow, and to make an order for family allowance: *Dougherty v. Bartlett*, 100 Cal. 496, 499; 35 Pac. Rep. 431.

REFERENCES.

Jurisdiction in equity: See head-line 4, post.

(5) **Over trustees, to prevent mismanagement.** Notwithstanding the powers and discretion given to a testamentary trustee, he is subject to the direction and control of a court of equity, which will have full power to prevent mismanagement of the estate and to correct any abuse of the trust: *Keeler v. Lauer*, 73 Kan. 388; 85 Pac. Rep. 541; and the probate courts in California, in the exercise of their equitable jurisdiction, have undoubtedly the same power: *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317, 319; *Mackay v. San Francisco*, 128 Cal. 678, 685; 61 Pac. Rep. 382. In the state of Washington, where trustees of the property of an estate, instead of executors, have been appointed by a non-intervention will, the probate court has no jurisdiction of the questions involving the management of the estate; but the same are cognizable in equity, particularly where the complaining party is not a creditor of the estate, nor an heir within the meaning of that term as used in the statute: *City of Seattle v. McDonald*, 26 Wash. 98; 66 Pac. Rep. 145, 147.

3. Executor and testamentary trustee.

(1) **Object of law.** The object of section 1699 of the Code of Civil Procedure of California was to provide a convenient and effective method of procedure by which to secure a judicial determination, binding on all persons interested, that the estate is all accounted for,

the accounts fully settled, and the trust executed: *McAdoo v. Sayre*, 145 Cal. 344, 348; 78 Pac. Rep. 874. The policy of the probate law is to reach final settlement and distribution of the estate as soon as may be, whether the deceased died testate or intestate, and this should be no less the policy where the trustees are made by the will devisees in trust: *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317, 320.

(2) **Testamentary trustees. In general.** A testamentary trustee does not take by virtue alone of the decree of distribution. He takes as trustee under the will at the death of the testator: *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317, 319. The estate which a trustee under a will takes is not necessarily a fee, but only such an estate as is required for the execution of his trust. He may be given an estate expressly limited in duration to the minority of the children: *Keating v. Smith*, 36 Cal. Dec. 158, 162 (Aug. 27, 1908). The trustees under a will may maintain an action for partition of the lands devised to them in trust, inasmuch as the devise carries the title, with the power to sell: *Noecker v. Noecker*, 66 Kan. 347; 71 Pac. Rep. 815, 816. As to the execution of the trusts by trustees under a will, after distribution, the trustees are governed by the decree, and not by the will: *Goldtree v. Thompson* (Cal.), 20 Pac. Rep. 414. (Thornton J., dissenting). See *Goldtree v. Thompson*, 79 Cal. 613; 22 Pac. Rep. 50. Where, under a will, certain trusts are created, performable within the state of Washington, and the trustees therein have in their possession within that state funds belonging to said trusts, and are in that state, using the same in strict compliance with the terms of such trust, all of the parties and all of the property involved are, for all the purposes of an action brought to restrain one of the executors from further prosecuting a proceeding in another state in relation to such trust, deemed to be personally within the jurisdiction of the trial court in which such proceedings to restrain are instituted, and jurisdiction to enjoin proceedings in such foreign state exists in the courts of the state of Washington. A distinction is drawn between a court of equity interfering with the action of the courts of a foreign state, and restraining persons within its own jurisdiction from using foreign tribunals as instruments of wrong and oppression: *Rader v. Stubblefield*, 43 Wash. 334; 86 Pac. Rep. 560, 566.

REFERENCES.

Power of corporation to act as trustee: See note 8 Am. & Eng. Ann. Cas. 1181.

(3) **Executors who are trustees under will. Distinct and separate capacities.** One chosen to execute the directions of a will may be given two characters, that of an executor, and that of a trustee; but the duties of the one are separate and distinct from, and independent of, the other. When a person has been appointed by a testator to

execute the requests of a will, and is also vested by such testament with an interest in, or a power over the property which, after the testator's death, he is to perform for the benefit of, or to the use of, another, the relation of the person so appointed to the estate, when legally committed to him, must, upon principle, be the same as if a branch of the duties were delegated to one person as executor and the remaining part to another as trustee. When the same person has been appointed by a will to perform such dual duty in respect to the property of an estate, no service is demanded of him as testamentary trustee, until he has fully performed his executorial obligation, and secured an order of the probate court discharging him, and liberating his bondsmen. Where the same person is executor and trustee, he must give a bond in his character of trustee before he can exonerate himself from his liability as executor: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 122. The relation of the testamentary trustee of the trust property is different from that of an executor: *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317, 320. The fact that the two offices of trustee and of executor are held successively by the same individuals, does not give to them, in the exercise of one office, the power that had been conferred for the exercise of the other: *Goad v. Montgomery*, 119 Cal. 552, 561; 63 Am. St. Rep. 145; 51 Pac. Rep. 681. It is the duty of the personal representative to preserve the trust funds, in common with the other funds which have come into his possession: *Elizalde v. Elizalde*, 137 Cal. 634, 638; 66 Pac. Rep. 369; 70 Pac. Rep. 861; but executors, as such, are not trustees of an express trust, and the authority conferred upon them as such by the directions of the will, creates only such a trust as pertains to the office of executor: *Estate of Pforr*, 144 Cal. 121, 125; 77 Pac. Rep. 825. If an executor, who is also appointed as trustee for the purpose of converting assets into cash and paying the proceeds over to a guardian, never assumes, as trustee, to perform such duty, but does assume to perform it in the capacity of executor, the sureties on his bond are estopped from questioning the capacity in which he was acting: *Bellinger v. Thompson*, 26 Or. 320; 37 Pac. Rep. 714, 718. Where the same person is named in a will both as executor and as trustee, and is by the terms of the will required to execute certain trusts created by the will, the two capacities, those of executor and trustee, are distinct and independent of each other, and his power and duty as a trustee does not begin until, as executor, he has ceased to have any control over the property: *Joy v. Elton*, 9 N. D. 428; 83 N. W. Rep. 875; *Goad v. Montgomery*, 119 Cal. 552, 561; 63 Am. St. Rep. 145; 51 Pac. Rep. 681. As the duties of executors and trustees are separate and distinct, and as separate, distinct bonds must be given, the bonds given by executors will not protect the estate against the nonfeasance or misfeasance of the trustees, though they be the same individuals: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 514.

(4) **Duty, power, and liability of testamentary trustee.** Where trust duties are imposed upon trustees as devisees and legatees under a will, such duties cannot properly be assumed by the same persons who were named as executors under the will, and who have qualified as such executors, until the court has approved their accounts and ordered a distribution of the estate, in which order the executors may be directed to credit their accounts, as executors, with such of the estate as may be ordered transmuted to their accounts as trustees, or are otherwise authorized by the court to transfer the residue of the estate in their hands as executors to themselves as trustees: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 517. If the same persons are named in the will as its executors and as trustees, their powers and duties as trustees do not begin until, as executors, they have ceased to have any control over the property, and the decree of distribution is to be considered for the purpose of ascertaining their powers: *Goad v. Montgomery*, 119 Cal. 552, 561; 63 Am. St. Rep. 145; 51 Pac. Rep. 681. They do not become trustees, however, by virtue alone of the decree of distribution, but take as trustees under the will at the death of the testator; and while fuller and more complete powers and duties are devolved upon them by the decree of distribution, they have the same rights and powers, where they are devisees, as any other devisee, prior to distribution: *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317, 319. Under the statutes of Washington, and where the will so provides, trustees appointed by the will are legally authorized to manage and settle the testator's estate, in the manner directed in his will, without the intervention of the court having probate jurisdiction: *Newport v. Newport*, 5 Wash. 114; 31 Pac. Rep. 428. But in that state, if a non-intervention will makes the executor trustee of the estate for the purpose of paying creditors, it means such creditors only as qualify by proving their claims within the proper time as in other estates, and thereby making themselves beneficiaries of the trust: *Foley v. McDonnell* (Wash.), 93 Pac. Rep. 321, 323. A release of one's person from legal guardianship does not imply the duty of a trustee to surrender, or of a married female minor to demand from such trustee, a legacy intrusted to his care and control for delivery to beneficiaries as soon as they severally attain lawful age: *Montoya De Antonio v. Miller*, 7 N. M. 289; 34 Pac. Rep. 40. If a will commits to trustees the whole estate bequeathed to minor children, with directions to pay them the income for life, the petition of a guardian for the payment of the income to him will be dismissed, for the reason that the entire control of such estate is in the trustees: *In re Young's Estate*, 17 Phila. 511.

(5) **Duties of trustee cannot be assumed until when.** The duties of an executor and trustee are separate and distinct from and independent of each other; and, until one is discharged from the former, and

assumes the duties of the latter, his liability as executor still continues: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 122.

(6) **Duty of testamentary trustee before distribution.** While the testamentary trustee, who is a devisee under the will, may not, prior to distribution, deal with the property as fully as he may after distribution, there seems to be no reason why he may not exercise the rights and powers that any other devisee may exercise, in a proper case and under justifiable circumstances. That a duty respecting the trust property may devolve upon the trustee before distribution, and that a liability may attach to him for a failure to discharge that duty, rests both upon reason and authority. Whatever may have been the object of the testator in creating a testamentary trust and appointing one of the trustees as executrix, certain it is that he would not have appointed trustees at all if he had intended to commit the management of the estate exclusively to the executrix, and that it should reach his heirs at law, or the beneficiaries of the trust, directly through distribution by the executrix, and the administration then to cease. The testator, having devised his estate to trustees, it becomes their duty, having accepted their trust, to obtain control of the trust property. When the trustees should take that step, where the will names one of them as executrix, or under what circumstances, it is not necessary to stipulate, as the court would be the ultimate judge on the case presented. But clearly it is the duty of the trustees to take such action, under all proper circumstances, and a failure to do so renders them liable to the beneficiaries, if loss of the estate or damage thereto ensues: *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317, 320.

(7) **Discharge of executor acting as trustee.** Where the same person is appointed both executor and trustee, it is difficult, though sometimes of importance, to determine when the office of executor has ceased and that of trustee has commenced. The rule appears to be that, if a part of the assets have clearly been set apart and appropriated by the executor to answer a particular trust, he will be considered to hold the fund as the trustee for that trust, and no longer as mere executor: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 514. But, where the same person is named as executor and also as trustee under a will, he is, as executor, chargeable until he gives a bond as trustee (unless exempted from giving such a bond), and settles his account in his administration, and charges himself as trustee. If a testator in his will appoints his executor to be a trustee, it is as if different persons had been appointed to each office. Executors must act, and executorial responsibility can only terminate after a compliance with the statute, and after a settlement, approved by the court, has been made, and a distribution and delivery up has been ordered by the court: *In re Higgins' Estate*, 15 Mont. 474; 39

Pac. Rep. 506, 515, 517. An executor, who is also named in the will as trustee, after taking possession of assets belonging to the estate as executor, cannot relieve himself and his bondsmen, with respect to such assets, by his own mere mental operations, and thereby cross the line dividing the two capacities in which he is acting, those of executor and trustee. To be discharged from his liability as an executor, he must take some affirmative action of a character which is open and notorious, such as would be an accounting in the court from which he received his letters as executor, and a discharge as executor: *Joy v. Elton*, 9 N. D. 428; 83 N. W. Rep. 875.

(8) **Trust with power to sell under will.** A will which does not confer upon executors the power to make any sale or disposition of the testator's estate, other than that they "shall have the property sold" at the expiration of two years after his death, and shall distribute the proceeds among his designated beneficiaries, does not devise the land to his executors in trust for the purposes of his will, but merely gives them certain directions to be observed in carrying out its provisions. Such authority given by the testator creates only such a trust as pertains to the office of executor; and the sale which is thus directed is to be made by them as executors of his will, and as a part of their administration of the estate, and not as the trustees of an express trust, and is ineffective without a confirmation by the court: *Estate of Pforr*, 144 Cal. 121, 125, 126; 77 Pac. Rep. 825. A will authorizing the executrix to sell any property of the estate at public or private sale, with or without notice, and without any order from the court, and which contains provisions for certain of the property not otherwise specifically disposed of, to go to the wife in trust for the children, and to be held by her until one of the daughters has arrived at the age of twenty-one years, does not, by the effect of these provisions, prevent an absolute disposition of the property until after the time the daughter arrives at the required age, unless in the meantime, it can be sold at the prices fixed in the will. Nor does a will of this character devise the lands in trust with power to sell in execution of such trust, nor create any trust in her except such as pertains to her office as executrix: *Estate of Campbell*, 149 Cal. 712, 715; 87 Pac. Rep. 573, 574; *Bank v. Rice*, 143 Cal. 272; 76 Pac. Rep. 1020.

REFERENCES.

Sales under power in will: See note § 592, head-line 38, ante.

(9) **Testamentary guardians.** Where a general guardian is named as testamentary guardian in the purported will, he has, upon his appointment, authority to conduct litigation over the purported will, and where the will appears to be legal and fair upon its face, it is within the scope of his power and authority to pursue reasonable methods for the proof and probate of the instrument, and to incur

expenses in connection therewith: *In re Brady's Estate*, 10 Ida. 366; 79 Pac. Rep. 75, 76.

4. Jurisdiction in equity. If the office of trustee is separate from, and independent of, the office of executor, a court of equity may remove the incumbent from the office of trustee, and leave him to act as executor; or, if he has completed his duties as executor, and is holding and administering the estate simply as trustee, a court of equity may remove him: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 515. In an action against the trustee for an accounting and for fraud, a court of equity, and not the probate court has jurisdiction: *Courrier v. Johnson*, 19 Col. App. 94; 73 Pac. Rep. 882. In a case where extrinsic or collateral fraud upon the probate court has prevented a fair submission of the controversy, equity may give relief. Thus in an action to obtain a decree adjudging persons to hold property as trustees for heirs, the title to which they are alleged to have fraudulently procured in the administration of a decedent's estate as trustees of a void trust in the will; and, where the complaint is that the former proceedings were wholly sham, a mere fraudulent contrivance designed solely to give the appearance of legality and protection against attack to what was, in fact nothing but the taking of plaintiff's property without consideration and without any authority of law, and that they were carried through by means of false representations, and the real facts and purposes of the transaction were concealed from the probate court, such an imposition upon the jurisdiction of the probate court, to the injury of the absent property owners, from whom the nature of the transaction was concealed, and who were wholly in ignorance thereof, and could not have learned concerning the same from anything appearing on the face of the purported proceedings, clearly constitutes what is known as extrinsic fraud warranting equitable relief: *Campbell-Kawannanako v. Campbell* (Cal.), 92 Pac. Rep. 184, 187. In *Dougherty v. Bartlett*, 100 Cal. 496; 35 Pac. Rep. 431, the court expressed no opinion upon the question whether a suit in equity could be maintained, prior to the distribution of the estate, to compel executors named in the will, who were also appointed as trustees therein, to enforce the performance of a special trust, and for the accounting of the trust estate by the trustees thereof. A probate court has no power to require trustees, as such, to act. A court of equity alone can do that: *Gibson v. Kelly*, 15 Mont. 474; 39 Pac. Rep. 506, 516. The superior court has jurisdiction to make an allowance to testamentary trustees for counsel fees in obtaining a distribution of the estate to the trustees: *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317, 321.

REFERENCES.

Jurisdiction of probate courts: See head-line 2, subd. 4, ante.

5. Jurisdiction. Sale by trustees. Where the persons named in a will as its executors are the same as those to whom the testator directed the property to be distributed in trust for his children, a power of sale conferred upon them as executors is not applicable to the property distributed to them as trustees under the will. Such a power terminates with their discharge as executors. The testator may have been willing to give this power of sale to the executors since he knew that every sale by them must be confirmed by the court before the title to the land would pass from his estate, while he might have been unwilling to vest the same persons with a power whose exercise would be without his supervision and control: *Goad v. Montgomery*, 119 Cal. 552, 561; 63 Am. St. Rep. 145; 51 Pac. Rep. 681. But, while the law charges courts with the exercise of special care and control over proceedings involving the estates of deceased persons, and while the statute expressly provides for, and requires, the confirmation of the court in sales by executors and administrators of property belonging to the estates of deceased persons, yet, in the case of trust property, no such duty is expressly imposed upon the court by the law, and the court cannot acquire jurisdiction to exercise or perform such duties in such a case by the mere agreement of the parties. There is no rule of law by which a court may or may not refuse to confirm a sale made by a trustee, and in the absence of express law requiring the confirmation of the sale by testamentary or other trustees of an express trust, the court must look to the instrument creating such officer and defining his duties for the purpose of ascertaining his authority over the trust property: *Murphy v. Union Trust Co.* (Cal. App.), 89 Pac. Rep. 988, 990.

6. Discretionary trusts. A trust is not void for the reason that it leaves to the discretion of the trustees the question as to how much income shall be used to support and educate the children of the testator: *Estate of Reigh*, 144 Cal. 314; 77 Pac. Rep. 942, 944. Where a husband bequeathed all of his estate to his wife, and in the will made the following provision: "I recommend to her the care and protection of my mother and sister, and request her to make such provision for them as in her judgment will be best," it was held that a trust was imposed on the wife to make suitable provision for the mother and sister: *Colton v. Colton*, 127 U. S. 300; 8 Sup. Ct. Rep. 1164; 32 L. ed. 138. (Appealed from the circuit court of the United States for the district of California). But where the trustees are to receive land and the profits of land, and apply the net proceeds of the same to the use and benefit of the beneficiaries to such extent and at such time as in their judgment shall be proper, such discretionary clause renders the trust void, because it is, in its main feature, not imperative, but merely discretionary: *Estate of Sanford*, 136 Cal. 97, 100; 68 Pac. Rep. 494.

7. Devises in trust. No general rule can be stated that will determine when a conveyance will carry with it the whole beneficial interest, and when it will be construed to create a trust; but the intention is to be gathered in each case from the general purpose and scope of the instrument: *Estate of Reigh*, 144 Cal. 314, 318; 77 Pac. Rep. 942, 943. A devise in a will of personal and real property to the executor, "in trust for the execution of my will," following a bequest to the children of the testator providing that "one half of all the moneys that may be realized from the sale of all my personal and real property of whatsoever kind, shall be paid to them respectively when they attain the age of 21," is a devise to the children, and each of them, and not to the executor; the right to the property passes to the children, but the right of immediate possession to the executor: *Rogers v. Strobach*, 15 Wash. 472; 46 Pac. Rep. 1040, 1041. Under a will in which the residuum is bequeathed to trustees in trust, — "first, to pay over the income to the parties mentioned during the periods prescribed, and, whenever such proportions cease; then, second, in trust (not to pay over) for his or her children;" the children take the corpus of the property held in trust and not the revenue only: *Goldtree v. Thompson*, 79 Cal. 613; 22 Pac. Rep. 50, 51. Where a testator devised property to his children and directed that the same be held by the executors in trust for them until they became of legal age, and where one of the children married before attaining legal age, it was held that, in the absence of an express intention in the will to the contrary, marriage cannot change the status of minority, in the absence of statutory enactment, and that, under the terms of the will, such child is not entitled to her portion of the estate until arriving at legal age in the sense as employed by the testator: *Montoya De Antonio v. Miller*, 7 N. M. 289; 34 Pac. Rep. 40. Where a provision was made in a will for a trust, reposing in the mother the control of the property devised to a daughter, and which was not created for the purpose of affecting the ownership of the lands, its sole object being to protect and preserve the property for the use of the devisee, such provision cannot be held to change the character of the estate: *Kinthead v. Maxwell* (Kan.), 88 Pac. Rep. 523. A testator may set apart out of the money of his estate a reasonable amount with which to erect a monument over his grave: *Estate of Koppikus*, 1 Cal. App. 84; 81 Pac. Rep. 732, 733.

8. Purposes of trust communicated orally. Independently of the statute of wills, where a testator bequeaths property in trust to a legatee, without specifying in the will the purposes of the trust, and at the same time communicates those purposes to the legatee orally, or by unattested writings, and the legatee, either expressly or by silent acquiescence, promises to perform the trust, and the trust itself is not unlawful, a court of equity will raise a constructive trust in favor of the beneficiaries intended by the testator: *Curdy v. Berton*, 79 Cal. 420; 21 Pac. Rep. 858.

9. Accounting.

(1) **Distinction between accounts.** The court, upon the final accounting of a testamentary trustee who is a devisee under the will, has the power to dispose of the entire matter of the trust by determining who is entitled to the property, and directing the trustee to turn it over to the persons entitled thereto. But the accounts thus settled are the accounts of the trustee acting in that capacity, and are separate and distinct from the accounts of the executor, which latter are settled before, or at the time of the final distribution: *Estate of O'Connor*, 2 Cal. App. 470, 475; 84 Pac. Rep. 317, 319.

(2) **Duty and liability to account.** Every trustee who, by the terms of the instrument creating the trust, has possession or control of the trust property, is chargeable in his accounts with the whole of the estate thus committed to his hands. Aside from his allowance for compensation and expenses, he cannot, in his account, obtain credit against this charge, except as he may dispose of the trust property to a beneficiary in the lawful execution of the trust, in which case he is entitled to credit thereon for the property so disposed of; and when he has thus disposed of all, his account then stands balanced and then only has he fully accounted and become entitled to his discharge. He may, if he chooses, exercise his own judgment as to the beneficiary, and, upon the termination of the trust, deliver the property to such person before presenting his accounts for settlement, or he may present his account for compensation and expenses, and obtain settlement to that extent before proceeding to make a settlement with the beneficiary, and then present for settlement a supplementary account for the balance. But, in either case, he has not fully accounted until he has thus disposed of the entire estate, and he will remain subject to be called on to account until this is done, and until the court, having jurisdiction of the accounts, has, upon a hearing, declared the account correct and the trust fully executed: *McAdoo v. Sayre*, 145 Cal. 344, 348; 78 Pac. Rep. 874; *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317.

(3) **Involves what determination. Power of court.** The settlement of the final account of the testamentary trustee, in accordance with the provisions of section 1699 of the Code of Civil Procedure of California, will necessarily involve a decision as to the effect of the instrument by which the trust was created, in order to ascertain who is entitled to the trust estate, and to determine whether or not the trustee has properly disposed of it in the execution of the trust. In many cases a determination of this question will be necessary upon the settlement of the current accounts, but in the case of a final account, showing complete execution of the trust, it will be necessary in every case. Furthermore, in the case of bills for an accounting in

equity, the proceeding has always been to ascertain who was entitled to the balance found on hand, and to give judgment accordingly in his favor against the trustee. The forms of interlocutory decrees, in such cases, include a judgment of this character, to become effective on the approval of the account. These methods of procedure in probate and in equity were obviously not established arbitrarily, but from the necessities of the case, and because there could be no complete accounting without establishing the right of the parties entitled to the property accounted for when it was passed from the control of the trustee: *McAdoo v. Sayre*, 145 Cal. 344, 350; 78 Pac. Rep. 874; and see *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317.

(4) **Calling trustees to account.** Under section 1699 of the Code of Civil Procedure of California, one who has no interest in the trust has no standing in court to assail the account presented by the trustees, or to move the court to require an account of them. The section in question gives the right to apply for an order on the trustees for an accounting exclusively to the beneficiary or his guardian. Even if this provision were omitted, such right would still be limited to those having some interest in the trust, or in the trust property. The trustee then has the right, when an account presented by him is attacked by objections at the hearing, or when he is cited to appear and to render an account, to make the preliminary objection that the person who thus invokes the action of the court with respect to himself, has no interest in the property, and hence cannot be heard to make his objection, or to demand an accounting. This objection of the trustee may be disputed, and thereupon the court must determine whether or not such party is a beneficiary, or is interested in the trust. So, also, there may be two or more parties, each claiming to be beneficiaries. In such a case the trustee may be justly entitled to credits if one of these parties is the real beneficiary, which he could not have if the other were the party interested. The account cannot be settled without a determination of the question as to which party is entitled. Considered as a mere matter of power, therefore, the court must have the authority, in such a proceeding, whenever the necessity properly arises, to determine who are the parties entitled as beneficiaries: *McAdoo v. Sayre*, 145 Cal. 344, 346; 78 Pac. Rep. 874. An accounting may be ordered by the court: *In re Higgins' Estate*, 15 Mont. 474; 39 Pac. Rep. 506, 517.

(5) **Compensation of trustee.** It is altogether too narrow a view of the testamentary trustee's relation to the trust property, to say that it begins at distribution, and not before, and that his expenses, incurred in the discharge of a duty he owes to the trust, are limited to such as arise after distribution, and under no circumstances to any expenses incurred prior to distribution. Whether the action of the trustee in

seeking distribution is reasonable or unreasonable, and whether justified by the circumstances under which he acts, is a matter for the court to determine. But, when he has been compelled to act, and the necessity for action finds justification by his success, there is neither justice nor reason in denying to the court the power to determine whether or not he should be paid for necessary expenses out of the trust fund; and the court has jurisdiction to determine what, if any, allowance should be made out of the trust estate for the services of the trustee's counsel in procuring distribution of the property to the trustee; and where a claim is fairly before the court, the court does not lose jurisdiction by passing upon other items of the account of the trustee: *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317, 319, 321. It is a principle of equity that one having a common interest with others in a trust fund, who successively maintains his suit to prevent diversion of the trust fund, may be reimbursed for costs and expenses, including attorneys' fees: *Estate of O'Connor*, 2 Cal. App. 470; 84 Pac. Rep. 317, 321; *Mitau v. Roddan*, 149 Cal. 1; 84 Pac. Rep. 145. Where a declaration of trust is silent upon the subject of the trustees' compensation, the regulation or fixing thereof is controlled, by express authority of section 2274 of the Civil Code of California, by section 1618 of the Code of Civil Procedure of that state. If the sole duties of the trustee are to attend to the collection of rents, payment of taxes and insurance, and to keep the trust property insured, he is not entitled, upon the termination of the trust, to commissions upon the corpus of the trust property. Under such circumstances the proper basis of compensation ought properly to be the commissions upon the sums of money, or their equivalent, received or paid out by the trustee; and, in the case of successive trustees of the same trust estate, each one's claim to compensation must be adjusted with reference to the rights of his predecessors in the office of trustee: *In Matter of Leavitt*, 7 Cal. App. Dec. 286, 289 (Sept. 9, 1908).

10. Distribution to trustees.

(1) **Power of court.** A decree of distribution to trustees named in will, and who are also its executors, is the instrument by virtue of which the trustees receive the property in trust, and the powers and duties in regard to such property are to be measured by the terms of the decree. For the purpose of enabling the court to distribute the estate of a testator in accordance with his will, it is required to consider the will, as well as the estate left by him, and to construe its terms for the purpose of determining his intention, and to make its order or decree of distribution in accordance with such construction; but, as in the case of a judicial determination of any other instrument, the instrument is but evidence upon which the court acts in rendering its judgment. The judgment, however, is the final determination of the rights of the parties to the proceeding, and, upon its entry, their

rights are thereafter to be measured by the terms of the judgment, and not by the instrument. Whether the distribution is to individuals, in their own right, or to hold for others under specified trusts, the rights of all parties interested in the estate are determined by the decree, and thereafter it becomes immaterial to consider whether the will has received a proper construction. The court may incorporate the provisions of the will in its decree, either in express terms, or by reference thereto. In such a case the terms of the will become the language of the decree, but it is still the decree, and not the will by which the rights of the parties are to be determined: *Goad v. Montgomery*, 119 Cal. 552; 63 Am. St. Rep. 145; 51 Pac. Rep. 681. If the estate is distributed to the trustees appointed under the will, the decree of distribution is a determination of the validity of the trust and of the right of the trustees to take under the will: *Goldtree v. Allison*, 119 Cal. 344, 346; 51 Pac. Rep. 561. The probate court has exclusive jurisdiction of the final distribution of the estate of a decedent, and such a decree of distribution, after due notice by the probate court, is conclusive upon a person who might have claimed that a share of the estate belonged to him, and this applies to a decree of distribution to trustees as well as to others: *Crew v. Pratt*, 119 Cal. 139, 149; 51 Pac. Rep. 38; *Goad v. Montgomery*, 119 Cal. 552; 63 Am. St. Rep. 145; 51 Pac. Rep. 681. Whatever may be the rights of the devisee under the will, the decree of distribution becomes the law of the estate. The court having construed the trust created by the will, that judgment and decree is final and conclusive upon all parties and the court: *Kauffman v. Foster*, 3 Cal. App. 741; 86 Pac. Rep. 1108, 1109.

(2) **Effect and validity of decree.** A decree of distribution of an estate to trustees named in a will, upon certain trusts, is a conclusive adjudication of the validity of the disposition made by the testator. It determines the rights of all the parties claiming a legal or equitable interest under the will; the decree supersedes the will, and prevails over any provision therein which may be thought inconsistent with the decree: *Keating v. Smith*, 36 Cal. Dec. 158, 161 (Aug. 27, 1908). If a court, independently of the provisions of a will, has no power to create a valid trust, a decree, in so far as it may attempt to raise a trust, must be treated as a nullity: *McCloud v. Hewlett*, 135 Cal. 361, 368; 67 Pac. Rep. 333. Where trust property is distributed to trustees "for a period, for the uses, trusts, and purposes hereinafter in this decree specified," such decree gives to the trustee an estate only for years: *Estate of Reith*, 144 Cal. 314, 320; 77 Pac. Rep. 942.

(3) **On death, trust devolves on whom.** A trust having devolved upon a devisee in his lifetime, by a decree of distribution, which trust has been accepted by him, devolves, in case of his death, upon his

personal representatives: *Kauffmann v. Foster*, 3 Cal. App. 741; 86 Pac. Rep. 1108, 1110.

11. Discharge of trustees. The power of the court is not exhausted when it has adjusted all disputes as to the correctness of any items of the account, and has allowed compensation and expenses to the trustee and declared the balance due; it still has power, and it is its duty, whenever the power is invoked, to ascertain who is entitled to the trust estate already delivered by the trustee, and also that which yet remains to be delivered, and to make such orders as may be necessary to enable the trustee to make final settlement with the beneficiary in safety, and to secure a final settlement of his account which will entitle him to his discharge: *McAdoo v. Sayre*, 145 Cal. 344, 346, 350; 78 Pac. Rep. 874.

PART XIII.

ORDERS, DECREES, PROCESS, RECORDS, RULES OF PRACTICE, TRIALS, PROCEEDINGS TO TERMINATE LIFE ESTATES OR HOMESTEADS, OR COMMUNITY PROPERTY, ON OWNER'S DEATH IN CERTAIN CASES, NEW TRIALS AND APPEALS.

CHAPTER I.

ORDERS, DECREES, PROCESS, ETC.

- § 808. Orders and decrees to be entered in minutes.
- § 809. Form. Order fixing time for hearing.
- § 810. Form. Order continuing hearing.
- § 811. How often publication to be made.
- § 812. Form. Affidavit of publication.
- § 813. Recorded decree or order to impart notice from date of filing.
- § 814. Citation, how directed and what to contain.
- § 815. Form. Citation.
- § 816. Form. Citation to show cause why letters should not be
revoked for neglect to make return of sale.
- § 817. Citation, how issued.
- § 818. Citation, how served.
- § 819. Form. Certificate of service of citation.
- § 820. Form. Proof of personal service of citation.
- § 821. Personal notice, when to be given by citation.
- § 822. Citation to be served five days before return.
- § 823. One description of realty is sufficient.
- § 824. Rules of practice generally.
- § 825. New trials and appeals.
- § 826. Within what time appeal must be taken.
- § 827. Issues joined, how tried and disposed of.
- § 828. Court to try case when. Trial of issues.
- § 829. Form. Order appointing attorney.
- § 830. Decrees, what to be recorded.

- § 831. Costs, by whom paid in certain cases.
- § 832. Commitment for contempt. Removal. Appointment.
- § 833. Form. Order revoking letters for contempt, and appointing some other person administrator, executor, or guardian.
- § 834. Service of process on guardian.
- § 835. Disposition of life estate, or homestead, or community property, on owner's death, in certain cases.
- § 836. Form. Petition for decree of termination of life estate.
- § 837. Form. Order for notice of hearing of petition.
- § 838. Form. Notice of petition for termination of life estate, and of time and place for hearing same.
- § 839. Form. Decree declaring life estate terminated.
- § 840. Form. Petition for decree vesting homestead or community property in survivor.
- § 841. Form. Decree declaring homestead vested in survivor.
- § 842. Form. Decree declaring estate community property.

PROBATE PRACTICE AND PROCEDURE.

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|---|---|
| <ul style="list-style-type: none"> 1. Orders and decrees. <ul style="list-style-type: none"> (1) Form of, signing, filing, etc. (2) To contain description when. (3) Correction of errors. (4) Signing of minutes. (5) Misleading entries. Clerk's register. Effect of. (6) Presumptions. (7) Entry of, in records. (8) Effect of. Protection of administrator. (9) Are void when. (10) Vacating orders. (11) Collateral attack. (12) Obedience to, how enforced. 2. Publication. 3. Citations. <ul style="list-style-type: none"> (1) Compared with summons. (2) Service of. (3) Same. By publication. (4) Personal notice. | <ul style="list-style-type: none"> (5) Obedience to, how enforced. (6) Trial after response. 4. Notice, how waived. 5. Description once published is sufficient. 6. Rules of practice. 7. Trial in general. 8. Jury trial. 9. Attorney for absent heirs. 10. Costs. <ul style="list-style-type: none"> (1) In general. (2) Are statutory. (3) Discretion of court. (4) Do not include attorneys' fees. (5) No amendment of judgment to include. (6) Contesting probate of will. (7) Action against co-executor. (8) Presumption on appeal. 11. Disposition of life estates, etc. |
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§ 808. **Orders and decrees to be entered in minutes.** Orders and decrees made by the court, or a judge thereof, in probate proceedings, need not recite the existence of facts, or the performance of acts, upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered or adjudged, except as otherwise provided in this title. All orders and decrees of the court or judge must be entered at length in the minute-book of the court. **Kerr's Cyc. Code Civ. Proc., § 1704.**

The * indicates identity.

§ 809. . Form. Order fixing time for hearing.

Probate — 92

§ 811. **How often publication to be made.** When any publication is ordered, such publication must be made daily, or otherwise as often during the prescribed period as the paper is regularly issued, unless otherwise provided in this title. The court, or a judge thereof, may, however, order a less number of publications during the period. **Kerr's Cyc. Code Civ. Proc.**, § 1705.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1926.

Idaho.* Code Civ. Proc. 1901, sec. 4305.

Montana.* Code Civ. Proc., sec. 2911.

Nevada. Comp. Laws, sec. 3032.

Oklahoma.* Rev. Stats. 1903, sec. 1781.

South Dakota.* Probate Code 1904, § 333.

Utah. Rev. Stats. 1898, sec. 4027.

§ 812. **Form. Affidavit of publication.**

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County ² of _____, } ss.

_____, of said county ³ and state, having been first duly sworn, deposes and says:

That he is, and at all times embraced in the publication herein mentioned was, the principal clerk of the printers and publishers ⁴ of _____, a newspaper ⁵ printed and published daily (Sundays excepted) in said county; ⁶

That deponent, as such clerk, ⁷ during all times mentioned in this affidavit, has had, and still has, charge of all the advertisements in said newspaper; and

That a notice, of which the annexed is a true printed copy, was published in the above-named newspaper on the following dates, to wit, _____; ⁸ being for a period of once a week for four (4) weeks; and further deponent saith not.

Subscribed and sworn to before me this _____ day of _____, 19____.
_____, Notary Public,¹⁰ etc.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, city and county. 4. Or, printer or foreman. 5. "Of general circulation," if the statute requires it. 6. Or, city and county. 7. Or, printer or foreman. 8. Give date of each publication. 9. "Successive" weeks, if such is the fact. 10. Or other officer taking the oath.

§ 813. **Recorded decree or order to impart notice from date of filing.** When it is provided in this title that any order or decree of the court, or a judge thereof, or a copy thereof, must be recorded in the office of the county recorder, from the time of filing the same for record, notice is imparted to all persons of the contents thereof. **Kerr's Cyc. Code Civ. Proc., § 1706.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1927.

Idaho.* Code Civ. Proc. 1901, sec. 4306.

Montana.* Code Civ. Proc., sec. 2912.

Oklahoma.* Rev. Stats. 1903, sec. 1782.

South Dakota.* Probate Code 1904, § 334.

Utah. Rev. Stats. 1898, sec. 4040.

Wyoming.* Rev. Stats. 1899, sec. 4543.

§ 814. **Citation, how directed and what to contain.** Citations must be directed to the person to be cited, signed by the clerk, and issued under the seal of the court, and must contain:

1. The title of the proceeding;
2. A brief statement of the nature of the proceeding;
3. A direction that the person cited appear at a time and place specified. **Kerr's Cyc. Code Civ. Proc., § 1707.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1928.

Idaho.* Code Civ. Proc. 1901, sec. 4307.

Montana.* Code Civ. Proc., sec. 2914.

Nevada. Comp. Laws, sec. 3033.

North Dakota. Rev. Codes 1905, §§ 7914, 7915.

Oklahoma. Rev. Stats. 1903, sec. 1783.

South Dakota. Probate Code 1904, § 335.

Utah. Rev. Stats. 1898, sec. 4034.

Washington. Pierce's Code, § 2329.

Wyoming.* Rev. Stats. 1899, sec. 4544.

§ 815. Form. Citation.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The People of the State of ____.

To ____, Greeting.

By order of this court, You are hereby cited and required to appear before the judge of this court, at the court-room of Department No. ____ thereof, at the court-house² in the county³ of ____, on ____,⁴ the ____ day of ____, 19____, at ____ o'clock in the forenoon⁵ of that day, then and there to show cause, etc., ____.

Witness, the Honorable ____, judge of the ____⁶ court, in and for the county⁷ of ____, state of ____, with the seal of said court affixed, this ____ day of ____, 19____.

[Seal]

Attest: ____, Clerk.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Designate its location. 3. Or, city and county. 4. Day of week. 5. Or, afternoon. 6. Title of court. 7. Or, city and county.

§ 816. Form. Citation to show cause why letters should not be revoked for neglect to make return of sale.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The People of the State of ____.

To ____, Greeting.

By order of this court, You, the said ____, administrator² of the estate of ____, deceased, are hereby cited to appear before the ____³ court of the county⁴ of ____, state of ____, at the court-house,⁵ on ____,⁶ the ____ day of ____, 19____, at ____ o'clock a. m.,⁷ of that day, to show cause, if any you have, why your letters⁸ should not be revoked for neglecting to make a return of sale of the property of such

estate within thirty (30) days ^o after the making of such sale.

In witness whereof, I, ———, clerk of the court aforesaid, have hereunto set my hand and affixed the seal of said court, this ——— day of ———, 19——.

[Seal]

———, Clerk of the ——— Court.

By ———, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, executor, etc., according to the fact. 3. Title of court and department thereof, if any. 4. Or, city and county. 5. Give location of court-house. 6. Day of week. 7. Or, p. m. 8. Of administration, or letters testamentary, according to the fact. 9. Or other time prescribed by the statute.

§ 817. **Citation, how issued.** The citation may be issued by the clerk upon the application of any party, without an order of the judge, except in cases in which such order is by the provisions of this title expressly required. **Kerr's Cyc. Code Civ. Proc.**, § 1708.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1929.

Idaho.* Code Civ. Proc. 1901, sec. 4308.

Montana.* Code Civ. Proc., sec. 2915.

Nevada. Comp. Laws, sec. 3033.

Oklahoma. Rev. Stats. 1903, sec. 1783.

Utah. Rev. Stats. 1898, sec. 4034.

Washington. Pierce's Code, § 2329.

Wyoming. Rev. Stats. 1899, sec. 4545.

§ 818. **Citation, how served.** The citation must be served in the same manner as a summons in a civil action. **Kerr's Cyc. Code Civ. Proc.**, § 1709.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1930.

Idaho.* Code Civ. Proc. 1901, sec. 4309.

Montana.* Code Civ. Proc., sec. 2916.

Nevada. Comp. Laws, sec. 3034.

North Dakota. Rev. Codes 1905, §§ 7916, 7919, 7921.

Oklahoma.* Rev. Stats. 1903, sec. 1784.

South Dakota.* Probate Code 1904, § 336.

Utah. Rev. Stats. 1898, sec. 4034.

Washington. Pierce's Code, § 2330.

Wyoming.* Rev. Stats. 1899, sec. 4546.

§ 819. Form. Certificate of service of citation.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

I, _____, sheriff of the county ² of _____, do hereby certify:
That I served the within citation on the within-named _____
on the _____ day of _____, 19____, by delivering to him personally, in said county ³ of _____, a copy of said citation.

Dated _____, 19____. _____, Sheriff.

Fees, \$_____.

Explanatory notes. 1. Give file number. 2, 3. Or, city and county.**§ 820. Form. Proof of personal service of citation.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

_____, being duly sworn, says:

That he is over twenty-one years of age, not interested in the above-entitled estate, and is competent to be a witness in the matter of said estate; that on the _____ day of _____, 19____, he served the citation, directed by this court to be served, upon _____, _____, and _____, the persons named in said citation, by delivering to each of them personally, in said county ² and state, a copy of said citation, the original of which is hereto annexed.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, County Clerk of said County ³ of _____.⁴**Explanatory notes.** 1. Give file number. 2, 3. Or, city and county.
4. Or other officer authorized to take the oath.

§ 821. Personal notice, when to be given by citation. When personal notice is required, and no mode of giving it is prescribed in this title, it must be given by citation. **Kerr's Cyc. Code Civ. Proc.**, § 1710.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1931.**Idaho.*** Code Civ. Proc. 1901, sec. 4310.

Montana. Code Civ. Proc., sec. 2917.
Nevada. Comp. Laws, sec. 3033.
Oklahoma.* Rev. Stats. 1903, sec. 1785.
South Dakota.* Probate Code 1904, § 337.
Utah. Rev. Stats. 1898, sec. 4034.
Washington. Pierce's Code, § 2329.
Wyoming.* Rev. Stats. 1899, sec. 4547.

§ 822. **Citation to be served five days before return.** When no other time is specially prescribed in this title, citations must be served at least five days before the return day thereof. **Kerr's Cyc. Code Civ. Proc., § 1711.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1932.
Idaho.* Code Civ. Proc. 1901, sec. 4311.
Montana.* Code Civ. Proc., sec. 2918.
Nevada. Comp. Laws, sec. 3036.
North Dakota. Rev. Codes 1905, §§ 7915, 7924.
Oklahoma.* Rev. Stats. 1903, sec. 1786.
South Dakota.* Probate Code 1904, § 338.
Utah. Rev. Stats. 1898, sec. 4034.
Washington. Pierce's Code, § 2331.
Wyoming.* Rev. Stats. 1899, sec. 4548.

§ 823. **One description of realty is sufficient.** When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper, as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale, or notice of a petition for the confirmation thereof. It is sufficient to refer to the description contained in the publication of the first notice, as being proved and on file in the court. **Kerr's Cyc. Code Civ. Proc., § 1712.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1933.
Idaho.* Code Civ. Proc. 1901, sec. 4312.
Montana.* Code Civ. Proc., sec. 2919.
Oklahoma. Rev. Stats. 1903, sec. 1787.
South Dakota.* Probate Code 1904, § 339.
Wyoming.* Rev. Stats. 1899, sec. 4549.

§ 824. **Rules of practice generally.** Except as otherwise provided in this title, the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title. **Kerr's Cyc. Code Civ. Proc.**, § 1713.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1934.

Idaho. Code Civ. Proc. 1901, sec. 4314.

Montana.* Code Civ. Proc., sec. 2920.

Utah. Rev. Stats. 1898, sec. 3778.

Wyoming.* Rev. Stats. 1899, sec. 4550.

§ 825. **New trials and appeals.** The provisions of part two of this code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this title—apply to the proceedings mentioned in this title. **Kerr's Cyc. Code Civ. Proc.**, § 1714.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1946.

Colorado. 3 Mills's Ann. Stats., sec. 4815e.

Idaho. Code Civ. Proc. 1901, sec. 4315.

Montana.* Code Civ. Proc., sec. 2921.

North Dakota. Rev. Codes 1905, §§ 7960, 7961, 7962, 7963.

Wyoming.* Rev. Stats. 1899, sec. 4551.

§ 826. **Within what time appeal must be taken.** The appeal must be taken within sixty days after the order, decree, or judgment is entered. **Kerr's Cyc. Code Civ. Proc.**, § 1715.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1946.

Colorado. 3 Mills's Ann. Stats., sec. 4815e.

Idaho.* Code Civ. Proc. 1901, sec. 4316.

Kansas. Gen. Stats. 1905, § 3064.

Montana.* Code Civ. Proc., sec. 2922.

Oklahoma. Rev. Stats. 1903, sec. 1796.

South Dakota. Probate Code 1904, § 348.

§ 827. **Issues joined, how tried and disposed of.** All issues of fact joined in probate proceedings must be tried in con-

formity with the requirements of article two, chapter two, of this title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise by the court as in civil actions. **Kerr's Cyc. Code Civ. Proc.**, § 1716.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1935.
- Colorado.** 3 Mills's Ann. Stats., sec. 4815e.
- Idaho.*** Code Civ. Proc. 1901, sec. 4317.
- Montana.*** Code Civ. Proc., sec. 2923.
- Nevada.** Comp. Laws, sec. 3038.
- North Dakota.** Rev. Codes 1905, § 7941.
- Oklahoma.** Rev. Stats. 1903, sec. 1788.
- South Dakota.** Probate Code 1904, § 340.
- Utah.** Rev. Stats. 1898, sec. 4041.

§ 828. **Court to try case when. Trial of issues.** If no jury is demanded, the court must try the issues joined, and sign and file its decision in writing, as provided in sections six hundred and thirty-two and six hundred and thirty-three. If, on written demand, a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict.

[**New trial.**] Either party may move for a new trial, upon the same grounds and errors, and in like manner, as provided in this code for civil actions. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 506), § 1717.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1936.
- Colorado.** 3 Mills's Ann. Stats., sec. 4815e.
- Idaho.** Code Civ. Proc. 1901, sec. 4318.
- Montana.** Code Civ. Proc., sec. 2924.
- Nevada.** Comp. Laws, sec. 3038.
- North Dakota.** Rev. Codes 1905, § 7941.

Oklahoma. Rev. Stats. 1903, sec. 1788.

South Dakota. Probate Code 1904, § 340.

Utah. Rev. Stats. 1898, sec. 4042.

Wyoming. Rev. Stats. 1899, sec. 4552.

§ 829. Form. Order appointing attorney.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It being shown to the court, That an instrument which purports to be the last will of —, deceased, has been filed herein; that probate of the same has been petitioned for; and that there are minor heirs who are interested in said estate, —

It is ordered, That — be, and he is hereby, appointed as an attorney to represent — and —,² who are the minor heirs of said deceased, in all proceedings of said estate.

Dated —, 19—. —, Judge of the — Court.

Explanatory notes. 1. Give file number. 2. Give names.

§ 830. Decrees, what to be recorded. When a judgment or decree is made, setting apart a homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the recorder of the county in which the property is situated. **Kerr's Cyc. Code Civ. Proc., § 1719.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1938.

Idaho.* Code Civ. Proc. 1901, sec. 4320.

Montana.* Code Civ. Proc., sec. 2926.

Oklahoma.* Rev. Stats. 1903, sec. 1790.

South Dakota.* Probate Code 1904, § 342.

Utah. Rev. Stats. 1898, sec. 4040.

§ 831. Costs, by whom paid in certain cases. When it is not otherwise prescribed in this title, the superior court, or the supreme court, on appeal, may, in its discretion, order costs to be paid by any party to the proceedings, or out of the assets of the estate, as justice may require. Execution

for the costs may issue out of the superior court. **Kerr's Cyc. Code Civ. Proc., § 1720.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 868, p. 303.
- Arizona.*** Rev. Stats. 1901, par. 1939.
- Idaho.*** Code Civ. Proc. 1901, sec. 4321.
- Montana.*** Code Civ. Proc., sec. 2927.
- Nevada.** Comp. Laws, secs. 3038, 3042.
- North Dakota.** Rev. Codes 1905, §§ 7951, 7988.
- Oklahoma.** Rev. Stats. 1903, sec. 1810.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 1102.
- South Dakota.** Probate Code 1904, § 362.
- Utah.** Rev. Stats. 1898, sec. 4045.
- Wyoming.*** Rev. Stats. 1899, sec. 4554.

§ 832. Commitment for contempt. Removal. Appointment. Whenever an executor, administrator, or guardian is committed for contempt in disobeying any lawful order of the court, or a judge thereof, and has remained in custody for thirty days without obeying such order, or purging himself otherwise of the contempt, the court may, by order reciting the facts, and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor, administrator, or guardian in his stead. **Kerr's Cyc. Code Civ. Proc., § 1721.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1940.
- Idaho.*** Code Civ. Proc. 1901, sec. 4322.
- Montana.*** Code Civ. Proc., sec. 2928.
- Oklahoma.*** Rev. Stats. 1903, sec. 1791.
- South Dakota.*** Probate Code 1904, § 343.
- Utah.*** Rev. Stats. 1898, sec. 3840.

§ 833. Form. Order revoking letters for contempt, and appointing some other person administrator, executor, or guardian.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

It appearing that this court,² on the ____ day of ____, 19__, made an order directing the administrator³ of said

estate to file ____⁴ within ____⁵, which order was disobeyed; that said ____, the administrator⁶ aforesaid, was cited to answer for contempt of this court⁷ because of such disobedience; that, after a full hearing, he was committed to the custody of the sheriff of said county until he obeyed such order; and that he has remained in such custody for thirty (30) days⁸ without obeying said order, or otherwise purging himself of the contempt, —

It is ordered, That the letters⁹ issued to said ____, as such administrator,¹⁰ be, and they are hereby, revoked, and that ____, be appointed administrator¹¹ of said estate in his stead; and the clerk of this court is directed to issue letters¹² to the said ____ upon his filing a bond as required by law, in the sum of ____ dollars (\$____), to be approved by the judge of this court. ____, Judge of the ____ Court.

Dated ____, 19__.

Explanatory notes. 1. Give file number. 2. Or, a judge thereof. 3. Or, the executor, or guardian, etc., according to the fact. 4. State what order directed. 5. State time within which act was to have been done. 6. Or, executor, or guardian, as the case may be. 7. Or, a judge thereof. 8. Or, other time prescribed by the statute. 9. Of administration, guardianship, or letters testamentary, according to the fact. 10, 11. Or, executor, or guardian as the case may be. 12. Of administration, guardianship, or letters testamentary, as the case may be.

§ 834. Service of process on guardian. Whenever an infant, insane, or incompetent person has a guardian of his estate residing in this state, personal service upon the guardian of any process, notice, or order of the court concerning the estate of a deceased person in which the ward is interested, is equivalent to service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do. **Kerr's Cyc. Code Civ. Proc.**, § 1722.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1941.

Idaho. Code Civ. Proc. 1901, sec. 4313.

Montana.* Code Civ. Proc., sec. 2929.
North Dakota. Rev. Codes 1905, § 7917.
Oklahoma.* Rev. Stats. 1903, sec. 1792.
South Dakota.* Probate Code 1904, § 344.
Utah. Rev. Stats. 1898, sec. 4046.
Wyoming.* Rev. Stats. 1899, sec. 4555.

§ 835. Disposition of life estate, or homestead, or community property, on owner's death, in certain cases. If any person has died or shall hereafter die who at the time of his death was the owner of a life estate which terminates by reason of the death of such person, or if such person at the time of his death was one of the spouses owning lands as a homestead, which lands by reason of the death of such person, vest in the surviving spouse; or if such person was a married woman who at the time of her death was the owner of community property which passed upon her death to the surviving husband; any person interested in the property, or in the title thereto, in which such estates or interests were held, may file in the superior court of the county in which the property is situated, his verified petition setting forth such facts, and thereupon and after such notice by publication or otherwise, as the court may order, the court shall hear such petition and the evidence offered in support thereof, and if upon such hearing it shall appear that such life estate of such deceased person absolutely terminated by reason of his death, or such homestead or community property vested in the survivor of such marriage, the court shall make a decree to that effect, and thereupon a certified copy of such decree may be recorded in the office of the county recorder, and thereafter shall have the same effect as a final decree of distribution so recorded. **Kerr's Cyc. Code Civ. Proc., § 1723.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho. Code Civ. Proc. 1901, sec. 4281.
Montana. Code Civ. Proc., sec. 2930.
Wyoming. Rev. Stats. 1899, sec. 4556.

§ 836. Form. Petition for decree of termination of life estate.

[Title of court.]

[Title of proceeding.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____ Court of the County² of ____.

The petition of ____ respectfully shows:

That he is interested in the real property hereinafter described and in the title thereto; and is now the owner in fee³ thereof;

That heretofore and during the life of such life tenant, one ____⁴ was the owner of a life estate in said property which terminated at his death; and

That said ____⁵ died on or about the ____ day of ____, 19____, at ____⁶, and thereupon his life estate in said property ceased and terminated.

Said real property is situated in the county⁷ of ____, state of ____, and is described as follows: ____⁸.

Wherefore petitioner prays for a decree of this court to the effect that the life estate formerly held by the said ____⁹ in the real property above described, absolutely terminated at his death on the ____ day of ____, 19____.

____, Attorney for Petitioner., Petitioner.

[Add usual verification.]

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, state other interest of petitioner. 4, 5. Give name of deceased life tenant. 6. Give place of death. 7. Or, city and county. 8. Give description. 9. Give name of life tenant. The petition is addressed to the superior court—not the probate court.

§ 837. Form. Order for notice of hearing of petition.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It is ordered, That notice of the hearing and pendency of the petition filed herein for a decree determining a life estate² be given by a summons to be issued by the clerk in the form of a summons in a civil action directed to ____ and ____, etc.,³ heirs of said deceased, and, generally to all

other persons interested in the estate of said deceased, and to be served upon said heirs in the same manner and for the same time as a summons in a civil action is required to be served, and to be published for two successive weeks in a newspaper published in said county⁴ for notice to those interested other than said heirs.

And it appearing to the court that said —, above-named, resides out of the state of —, at —,⁵ —

It is ordered, That service of said summons be made on him by publishing the same at least once a week for two months in the —, the newspaper most likely to give him notice.⁶ —, Judge of the — Court.

Dated —, 19—.

Explanatory notes. 1. Give file number. 2. Or, to determine the disposition of a homestead, or of community property where the same has, by reason of death, vested in a surviving husband or wife. 3. Give the names of persons named as heirs in the petition. 4. Or, city and county. 5. Name the place; or, that his residence is unknown; or, that he cannot, after due diligence, be found within the state; or, that he has departed from this state; or, that he conceals himself to avoid the service of summons. 6. And, if ordered, where residence is known, that a copy of said summons be mailed, postpaid, directed to said — at his said place of residence.

§ 838. Form. Notice of petition for termination of life estate, and of time and place for hearing same.

[Title of court.]

[Title of matter.]¹

{ No. —² Dept. No. —
[Title of form.]

Notice is hereby given, That — and —, who are persons interested in the title to and in the real property hereinafter described, have filed a verified petition in said court and matter, setting forth that said — was the owner of a life estate in said real property, which absolutely terminated by reason of her death on —, 19—, and praying the court to make a decree to that effect; and that the court has fixed —,³ the — day of —, 19—, at — o'clock in the forenoon⁴ of said day, and the court-room of said court,⁵ as the time and place for the hearing of said petition.

The said real property is situated in the county ⁶ of _____, state of _____, and is particularly described as follows, to wit: _____; ⁷ and said petition is here and hereby specially referred to for all particulars thereby shown.

Dated _____, 19____.

_____, Clerk.

By _____, Deputy Clerk.

_____, Attorneys for Petitioners.⁸

Explanatory notes. 1. As, In the Matter of the Life Estate of Mary Stiles in Certain Real Property Terminated by Reason of Her Death. 2. Give file number. 3. Day of week. 4. Or, afternoon. 5. Designate location of court-room. 6. Or, city and county. 7. Describe the property. 8. Give address.

§ 839. Form. Decree declaring life estate terminated.

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

Now comes _____, the petitioner herein, by _____, his attorney, and proves to the satisfaction of the court that he filed his petition herein on the _____ day of _____, 19____, for an order declaring a life estate terminated; that thereupon the court by order prescribed the notice to be given of the pendency and hearing thereof; and that in compliance with said order, notice of the pendency and hearing of said petition was duly given by _____; ² and the time of notice prescribed having elapsed, and no person having appeared to contest or oppose said petition, the court, after hearing the evidence, finds that the allegations of said petition are true, and that the prayer thereof ought to be granted.

It is therefore adjudged, decreed, and determined by the court, That the said _____ died on the _____ day of _____, 19____, and that his life estate, right, title, and interest in the land hereinafter described, has, by reason of his death, absolutely terminated; that neither the heirs of said deceased, namely, _____, and _____,³ nor any other person or persons claiming under said deceased, by descent, succession, or otherwise, have any right, title, interest, or estate in said land; and that the same is now vested in fee simple in _____,

free from any and all right, title, or claim, by or on account of any person claiming under said deceased.

The said land is situated in the county of _____, ⁴ state of _____, and is particularly described as follows, to wit: _____.⁵

Entered ⁶ _____, 19____.

_____, Clerk.

By _____, Deputy.

Explanatory notes. 1. Give file number. 2. Insert manner of notice as prescribed in order therefor and as proved. 3. Give the names. 4. Or, city and county. 5. Describe the land. 6. Orders or decrees need not be signed: See § 77, ante.

§ 840. Form. Petition for decree vesting homestead or community property in survivor.

[Title of court.]

[Title of proceeding.]

{ No. _____¹ Dept. No. _____
{ [Title of form.]

To the Honorable the _____ Court of the County ² of _____.

The petition of _____ respectfully shows:

That he is interested in the real property hereinafter described and in the title thereof as hereinafter stated;

That prior to the _____³ day of _____, 19____, petitioner and his wife, _____,⁴ had intermarried and had become husband and wife and so remained until the death of said wife ⁵ as hereinafter stated;

That the real property hereinafter described was acquired by said spouses during said marriage relation and was community property of said spouses;

That on or about said _____ day of _____, 19____, said real estate was duly selected and recorded as a homestead by declaration of homestead duly executed, acknowledged, and recorded in volume _____ of Homesteads, at page _____, in the office of the county recorder of the county ⁶ of _____;⁷

That on or about the _____ day of _____, 19____, said _____ died at _____,⁸ and thereupon said homestead ⁹ and all title thereto vested and now remains in your petitioner as surviving spouse of said marriage;

That the following is the name and residence of each of the persons who would be an heir at law of the separate property of the deceased, to wit:

Name.	Residence.	Relationship.
_____	_____	_____
_____	_____	_____

That the following is a statement of all claims of creditors against the deceased with the name and residence of each creditor, namely:

Name.	Residence.	Statement of claim.
_____	_____	_____
_____	_____	_____

Said real property is situated in the county of _____, state of _____, and is described as follows, to wit: _____.¹⁰

Wherefore petitioner prays for a decree of this court to the effect that the title to said homestead¹¹ vested in the petitioner on said _____ day of _____, 19____, and for such other or further order as may be meet.

_____, Attorney for Petitioner. _____, Petitioner.

[Add usual verification.]

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Give date of recording homestead; or, if application is for community property, give date of deed by which earliest parcel was acquired. 4. Or, husband, giving name of deceased spouse. 5. Or, husband. 6. Or, city and county. 7. In case the application is for community property, not homestead, this entire paragraph should be omitted. 8. Give place of death. 9. Or, community property. 10. Give description. 11. Or, community property.

Notice of the filing of such petition should be given as the court may order; and it would not be improper to order that notice be given by the personal service of a citation upon all persons residing within the state, who are named in and shown by the petition filed to be interested therein, including creditors, at least ten days prior to the hearing of said petition, and by publication, etc.

§ 841. Form. Decree declaring homestead vested in survivor.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes _____, the petitioner herein, by _____, her² attorney, and proves to the satisfaction of the court that she filed her³ petition herein on the _____ day of _____,

19—, for an order declaring the homestead vested in the survivor; that thereupon the court by order prescribed the notice to be given of the pendency and hearing thereof; and that in compliance with said order, notice of the pendency and hearing of said petition was duly given by —; ⁴ and the time of notice prescribed having elapsed, and no person having appeared to contest or oppose said petition, the court, after hearing the evidence, finds that the allegations of said petition are true and that the prayer thereof ought to be granted.

It is therefore adjudged, determined, and decreed by the court, That the said — died on the — day of —, 19—; that at the time of his ⁵ death the said petitioner was the wife ⁶ of said —, deceased; that upon the death of said deceased all his ⁷ right, title, interest, and estate in the lands hereinafter described became vested in the said — as surviving wife ⁸ of said deceased, the said land constituting a homestead duly selected and recorded in the lifetime of said deceased by said —, and being the community property ⁹ of said deceased, and his ¹⁰ said wife, ¹¹ —; and that neither of the other heirs at law, namely, —, ¹² nor any person interested in said estate, other than said petitioner did, upon the death of said deceased, receive or become vested by descent, succession, or otherwise, of any right, title, interest, or estate in said land, and that the same is now vested in fee simple in —, ¹³ free from any and all right, title, or claim, by or on behalf of any other person claiming under said deceased.

The said land is situated in the county ¹⁴ of —, state of —, and is particularly described as follows: —. ¹⁵

Entered ¹⁶ —, 19—.

—, Clerk.

By —, Deputy.

Explanatory notes. 1. Give file number. 2, 3. Or, his. 4. Insert manner of notice as prescribed in order therefor and as proved. 5. Or, her. 6. Or, husband. 7. Or, her. 8. Or, husband. 9. Or, the separate property of the person selecting or joining in the selection of the same. 10. Or, her. 11. Or, husband. 12. Give the names. 13. The survivor. 14. Or, city and county. 15. Describe the land. 16. Orders or decrees need not be signed: See § 77, ante.

§ 842. Form. Decree declaring estate community property.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes —, the petitioner herein, by —, his attorney, and proves to the satisfaction of the court that he filed his petition herein on the — day of —, 19—, for a decree declaring an estate to be community property; that thereupon the court by order prescribed the notice to be given of the pendency and hearing thereof; and that in compliance with said order, notice of the pendency and hearing of said petition was duly given by —;² and the time of notice prescribed having elapsed, and no person having appeared to contest or oppose said petition, the court, after hearing the evidence, finds that the allegations of said petition are true, and that the prayer thereof ought to be granted.

It is therefore ordered, adjudged, and decreed by the court, That the land hereinafter described was, during the lifetime of said deceased, and at the time of her death, the community property of —,³ deceased, and said —, her husband, who were then, and at the time the same was acquired by said deceased, husband and wife; and that the said land became, at the death of the said deceased, the property of said husband, and is now vested in the said —, free of all right, title, claim, or demand of any other person claiming under the said —, deceased, as heir or otherwise.

The said land is situated in the county⁴ of —, state of —, and is particularly described as follows: —.⁵

Entered⁶ —, 19—.

—, Clerk.

By —, Deputy.

Explanatory notes. 1. Give file number. 2. Insert manner of notice as prescribed in order therefor and as proved. 3. Give name of deceased wife. 4. Or, city and county. 5. Describe the land. 6. Orders or decrees need not be signed: See § 77, ante.

PROBATE PRACTICE AND PROCEDURE.

1. Orders and decrees.
 - (1) Form of, signing, filing, etc.
 - (2) To contain description when.
 - (3) Correction of errors.
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 - (12) Obedience to, how enforced.
- (5) Obedience to, how enforced.
- (6) Trial after response.
4. Notice, how waived.
5. Description once published is sufficient.
6. Rules of practice.
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9. Attorney for absent heirs.
10. Costs.
 - (1) In general.
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 - (3) Discretion of court.
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2. Publication.
3. Citations.
 - (1) Compared with summons.
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 - (3) Same. By publication.
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 - (7) Action against co-executor.
 - (8) Presumption on appeal.
11. Disposition of life estates, etc.

1. Orders and decrees.

(1) **Form of, signing, filing, etc.** There is no statute expressly authorizing the making of the memorial of the terms of an order of the superior court by the method of writing it on a separate piece of paper, and having the judge attach his signature thereto. It has become customary to do so, in many instances, and the courts have often recognized such a memorial as competent evidence of the terms of the order. But the code expressly requires probate orders to be entered in the minute-book of the court. It is the order there entered which is the order of the court, and it is the date of the entry of this order which sets the time running for an appeal. In making entries in the minute-book, it is neither necessary nor customary to begin the entries of each order with the statement of the name of the court in which it is made. Slight discrepancies between the entry of the order in the minute-book, and an order signed by the judge, and filed in the case, will not extend the time of appeal. Such time will commence to run from the entry of the first minute order: *Tracy v. Coffey* (Cal.), 95 Pac. Rep. 150, 151. There is no uniformity of the manner in which different judges sign or attest proceedings in the settlement of estates before them; sometimes they use their simple signature without any designation of their official character; sometimes they add such designation; but it has never been held or supposed that the validity of the orders or pro-

ceedings was, in any respect, affected by the absence of the official designation from the signature, or the presence of the designation, "county judge," instead of "probate judge." It has always been considered sufficient that the papers disclosed on their face the character in which the judge acted: *Touchard v. Crow*, 20 Cal. 150, 159; 81 Am. Dec. 108. A paper is filed when delivered to the proper officer; and endorsing it with the time of filing is not a part of the filing: *Smith v. Biscailuz*, 83 Cal. 344, 358; 21 Pac. Rep. 15; 23 Pac. Rep. 314. A paper or document is filed, within the meaning of the statute, when it is delivered to and received by the clerk to be kept among the files of his office, subject to the inspection of the parties. The indorsement required to be made thereon by the clerk is intended merely as a memorandum, and as evidence of the time of the filing, but is not essential thereto. The act of filing consists of presenting the paper to the proper officer, and of its being received by him, and disposed of by him among the records of his office. A paper may be filed without being marked or indorsed by the clerk: *In re Conant's Estate*, 43 Or. 530; 73 Pac. Rep. 1018, 1020. The indorsement, upon papers, of the fact of filing, does not constitute a part of the filing, but is only evidence that such filing has been made; and, while it is usual and proper for the officer with whom a paper has been filed, to indorse upon the same the fact and time of such filing, such indorsement is not absolutely essential to the validity of the filing, if the paper has been in fact delivered to the proper officer, at the proper place, for the purpose of being filed: *Starkweather v. Bell*, 12 S. D. 146; 80 N. W. Rep. 183, 185. If a notice of appeal and undertaking are in fact filed with the county judge, and placed on the files of the county court by the ex officio clerk of that court, the law as to filing is complied with, notwithstanding the indorsements of such filing are not made upon the papers by inadvertence, or otherwise, of the county judge, and notwithstanding the fact that the clerk of the circuit court and ex officio clerk of the county court, also by inadvertence, have indorsed the papers as having been filed in the circuit court instead of the county court: *Starkweather v. Bell*, 12 S. D. 146; 80 N. W. Rep. 183, 185.

(2) **To contain description when.** As the statute requires all orders and decrees of the court or judge in probate proceedings to be entered at length in the minute-book of the court, it is obvious that an order or decree, providing for the distribution of an estate, must describe the property distributed: *Estate of Sheid*, 122 Cal. 528, 529; 55 Pac. Rep. 328.

(3) **Correction of errors.** A probate court has power to amend its records to make them speak the truth: *Brooks v. Brooks*, 52 Kan. 562; 35 Pac. Rep. 215. It may correct its own errors in the settle-

ment of estates, either in regard to matters of law, or of fact, at any time before final settlement, provided it can be done from the record, without opening proof in the case: *Lucich v. Medin*, 3 Nev. 93, 106; *In re Millenovich*, 5 Nev. 161, 187. The court may correct an error in the names of petitioners in a case in probate pending and undetermined: *Lucich v. Medin*, 3 Nev. 93, 106. The substantial rights of parties are not to be affected by mere errors in the formation of the jury, or in the giving of instructions: *Estate of Moore*, 72 Cal. 335, 339; 13 Pac. Rep. 880. But an error in the judgment itself cannot be corrected, after the term at which it was rendered, under the statute authorizing courts of record to modify or vacate their own judgments for "irregularity in obtaining a judgment or order": *Lewis v. Woodrum* (Kan.), 92 Pac. Rep. 306.

(4) **Signing of minutes.** A statute requiring the orders and decrees of the probate court to be entered at length in the minute-book, and to be signed by the judge, but which is entirely silent as to the consequences to follow upon the failure of the judge to sign the minutes as therein provided, is merely directory: *McCrea v. Haraszthy*, 51 Cal. 146, 150.

(5) **Misleading entries. Clerk's register. Effect of.** Where it appears, without conflict, that an entry in the register upon which the appellant relied for his information had, in truth, no reference to the fact of the entry, at length, of a decree of distribution in the minute-book, and was not intended to record that fact, but that it referred to a wholly different step—an entry by the court-room clerk, in his rough daily minutes of proceedings, of the fact that the decree had been made and filed on a designated date; and the fact that appellant was misled by said entry, through his failure to make inquiry, where it appears that he could have obtained the true signification of such entry by inquiry in the clerk's office, cannot give him any rights which he does not otherwise have: *Estate of Pearsons*, 119 Cal. 27, 29; 50 Pac. Rep. 929.

(6) **Presumptions.** No presumption of the regularity of a probate order arises if a lack of jurisdiction appears: *Territory v. Mix*, 1 Ariz. 52. But every presumption, not upset by the record itself, is to be indulged in support of the regularity and validity of orders and decrees in probate. This presumption of regularity applies to the orders and decrees of probate courts, made within the limits of their restricted powers, the same as it does to proceedings of courts of general jurisdiction: *Estate of Twombly*, 120 Cal. 350, 351; 52 Pac. Rep. 815. In Wyoming, the presumption of regularity of the proceedings of a district court of that state applies to its proceedings in probate matters: *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 685.

(7) **Entry of, in records.** The proper place for the entry of a probate order is in the minute-book of the court: *Tracy v. Coffey* (Cal.), 95 Pac. Rep. 150, 151. For the purposes of an appeal, an order, decree, or judgment is "entered" when it is entered at large upon the minutes: *Estate of Sheid*, 122 Cal. 528, 529; 55 Pac. Rep. 328. To say that the court "made, entered, and filed" an order does not show that the "clerk" entered the order at length on the minute-book of the court. What the court does is one thing, and what the clerk does is quite another. When the court has entered its judgment, or filed its probate order, the function of the judge in that connection is ended. The duty of entering the judgment or order in the judgment-book is a mere ministerial duty, devolving upon the clerk, and it is the performance of that duty by the clerk, which gives the right of appeal, and constitutes the test of appellate jurisdiction: *Estate of Pichoir*, 139 Cal. 694, 696; 70 Pac. Rep. 214; 73 Pac. Rep. 604. The entry of probate orders, decrees, or judgments, in the book prescribed by the statute is no part thereof. They are perfect and complete, and have full force and effect before they are entered: *Estate of Hughston*, 133 Cal. 321, 323; 65 Pac. Rep. 742, 1039. The action of the court, outside of probate matters, does not depend upon the entry of its orders by the clerk, but upon the fact that the orders have been made, and whenever it is shown that an order has been made by the court, it is as effective as if it had been entered of record by the clerk: *Niles v. Edwards*, 95 Cal. 41, 47; 30 Pac. Rep. 134; *Von Schmidt v. Widber*, 99 Cal. 511, 515; 34 Pac. Rep. 109. The requirement of the statute, that probate orders and decrees must be entered in the minutes, implies that the date of entry should be affixed to the record; and if the entry, in the judgment-book, of an order or decree, bears no date, and there is no provision of the law for the authentication of the date of entry, the question as to such date must be decided upon evidence aliunde, that is to say, the testimony of the clerk or copyist, etc. The court cannot know that the entry has been made, and, above all, it cannot know when the copying was begun or completed, without taking evidence and determining its effect: *Estate of Pichoir*, 139 Cal. 694, 697; 70 Pac. Rep. 214; 73 Pac. Rep. 604. The register and the docket should be kept by the clerk with a regard for truth as to dates. In the whole range of the duties of the clerk, there is none more important than the duty of keeping a true history of the time when his "clerical" work was actually done. Under our practice, it is the initial point of many rights; and willfully to make a false certificate as to these matters is a violation of official duties. If the officers, whose duty it is to keep a correct record, are unable to remember when a judgment was actually entered, the moving party, to correct an alleged mistake as to the date of the entry of the judgment, may possibly become a loser through the vicious practice, in the clerk's

office, of keeping an inaccurate account of dates: *Menzies v. Watson*, 105 Cal. 109, 112; 38 Pac. Rep. 641. The superior court, acting as a court of probate, cannot conclude the jurisdiction of the supreme court by a statement, in the bill of exceptions, that the clerk's entry of a judgment or order was made at a particular date: *Estate of Pichoir*, 139 Cal. 694, 697; 70 Pac. Rep. 214; 73 Pac. Rep. 604. If the transcript on appeal shows only the date of the rendition of judgment, but does not show when it was entered, it does not appear from the record that the appellate court has jurisdiction: *Estate of Moore*, 143 Cal. 493, 495; 77 Pac. Rep. 407.

(8) **Effect of. Protection of administrator.** Under the constitution of the state of Idaho, the probate courts are given sole and exclusive, "original jurisdiction" in all matters of probate. As to those matters, the probate court is a court of record, to the judgment, records, and proceedings of which, in such matters, absolute verity is attached in every respect, as fully and completely as can attach to the records, judgments, and proceedings of district courts, or other courts of record: *In re McVay's Estate (Ida.)*, 93 Pac. Rep. 28, 31. But a probate order, reciting jurisdictional facts, is not conclusive if the record fails to show them affirmatively: *In re Charlebois*, 6 Mont. 373; 12 Pac. Rep. 775, 778. It has been held in Nevada, that if a probate order is lost from the files, and is not recorded in the minutes of the court, through carelessness of the clerk, proof of such order may be made dehors the record, and that such order will protect the executor or administrator who has paid out money under it: *In re Millenovich*, 5 Nev. 161, 187; but an unauthorized or void order is no protection to the representative; as, where the court attempted to make a disposition of moneys other than those belonging to the trust: *Estate of Kennedy*, 120 Cal. 458, 461; 52 Pac. Rep. 820; or, where the court has settled an account and apportioned the money in the hands of the administrator; directed that a designated sum be paid into court; and that the administrator shall thereupon be entitled to his discharge: *Estate of Sarment*, 123 Cal. 331, 337; 55 Pac. Rep. 1015; or, where the court attempts to authorize the administrator to replenish a stock of goods of decedent by the purchase of other goods: *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 523.

(9) **Are void when.** An order of a probate court made without authority of the statute is void: *Estate of Kennedy*, 120 Cal. 458, 461; 52 Pac. Rep. 820; *Estate of Sarment*, 123 Cal. 331, 337; 55 Pac. Rep. 1015; *In re Osburn's Estate*, 36 Or. 8; 58 Pac. Rep. 521, 523; *Andrus v. Blazzard*, 23 Utah, 233; 63 Pac. Rep. 888, 894; *Erwing v. Mallison*, 65 Kan. 484; 70 Pac. Rep. 369, 372. Thus an order appointing an administrator and granting letters of administration is void where the probate court, without jurisdiction, assumes to act in the

matter: *Ewing v. Mallison*, 65 Kan. 484; 70 Pac. Rep. 369, 372; and it is obvious that an executor or administrator cannot shield himself from personal liability, by refuge under an order which is absolutely void: *Andrus v. Blazzard*, 23 Utah, 233; 63 Pac. Rep. 888, 894.

(10) **Vacating orders.** A probate court or judge has the power to set aside an order which has been inadvertently made: *Raine v. Lawlor*, 1 Cal. App. 483; 82 Pac. Rep. 688, 689; *Clarke v. Baird*, 98 Cal. 642, 644; 33 Pac. Rep. 756. It may set aside an order made without authority: *Mallory v. Burlington etc. R. R. Co.*, 53 Kan. 557; 36 Pac. Rep. 1059, 1060. Thus letters of administration, issued without authority, may be set aside by the court in which they are issued, upon its own motion; or, such action may be taken at the instance of any one interested in the administration: *Mallory v. Burlington etc. R. R. Co.*, 53 Kan. 557; 36 Pac. Rep. 1059, 1060. The allowance of a claim made on an *ex parte* application may be set aside without notice to the claimant: *Estate of Sullenberger*, 72 Cal. 549, 552; 14 Pac. Rep. 513. As the court has no jurisdiction to order the administrator to make payment of a claim, after an appeal has been perfected by other claimants, such order, if made, will be annulled upon certiorari: *Pennie v. Superior Court*, 89 Cal. 31; 26 Pac. Rep. 617. Section 473 of the Code of Civil Procedure of California, which provides that a court may relieve a party from a judgment, order, or proceedings taken against him, through his "mistake, inadvertence, surprise, or excusable neglect," is applicable to probate matters, provided application be made within a reasonable time, not in any case to exceed six months; and the court has power, at any time within six months after the entry of the decree, to set it aside on a proper showing: *Dean v. Superior Court*, 63 Cal. 473; *De Pedrorena v. Superior Court*, 80 Cal. 144, sub nom. *In re Pedrorena*, 22 Pac. Rep. 71; *Levy v. Superior Court*, 139 Cal. 590; 73 Pac. Rep. 417; *Cahill v. Superior Court*, 145 Cal. 42; 78 Pac. Rep. 467.

REFERENCES.

Relief in equity from orders and decrees of probate and other courts having exclusive jurisdiction over the estates of decedents and of minors and other incompetent persons: See note 106 Am. St. Rep. 639-647.

(11) **Collateral attack.** The judgment of a probate court imports absolute verity, and cannot be collaterally attacked. It may, however, be impeached by evidence which appears on the face of the record, and which shows a want of jurisdiction. In other words, the decrees of such a court cannot be attacked collaterally for want of jurisdiction, unless the same appears on the face of the proceedings, or because of any error or irregularity. The decree, if not totally

void, is conclusive on collateral attack, so long as it remains in force: *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 685; *Wiggins v. Superior Court*, 68 Cal. 398; 9 Pac. Rep. 646; *Clark v. Rossier*, 10 Ida. 348; 78 Pac. Rep. 358, 360; *Hubbard v. Hubbard*, 7 Or. 42, 44; *Tustin v. Gaunt*, 4 Or. 305, 309; *Holmes v. Oregon etc. R. R. Co.*, 6 Saw. 262; 5 Fed. Rep. 75. "If it be found that the tribunal is one competent to decide, whether the facts in any given matter confer jurisdiction, it follows, with inexorable necessity that, if it decides that it has jurisdiction, then its judgment within the scope of the subject-matter over which its authority extends, in proceedings following the lawful allegation of circumstances requiring the exercise of its power, are conclusive against all the world, unless reversed on appeal, or avoided for error or fraud in a direct proceeding. It matters not how erroneous the judgment. Being a judgment, it is the law of that case, pronounced by a tribunal created for that purpose. To allow such judgment to be questioned or ignored collaterally would be to ignore practically, and logically to destroy, the court, and it is not necessary that the facts and circumstances upon which the jurisdiction depends shall appear upon the face of the proceedings because, being competent to decide, and having decided, that such facts exist by assuming the jurisdiction, this matter is adjudicated, and cannot be collaterally questioned": *Lethbridge v. Lauder*, 13 Wyo. 9; 76 Pac. Rep. 682, 685, quoting from 1 *Woerner on Law of Administration*, § 145. The remedy for one aggrieved by an order or judgment of a probate court, concerning matters in said court, is by a proper motion, or by appeal: *Clark v. Rossier*, 10 Ida. 348; 78 Pac. Rep. 358.

REFERENCES.

Probate judgments: See notes 33 Am. Dec. 242; 94 Am. Dec. 194; 95 Am. Dec. 115; 44 Am. St. Rep. 127.

(12) **Obedience to, how enforced.** When an executor or administrator refuses to pay to a distributee, money found to be in his hands, he may be punished for contempt. This, however, is based upon the proposition that the representative is an officer of the court, and may be so dealt with whenever he refuses to perform a plain duty enjoined upon him as such officer: *Estate of Kennedy*, 129 Cal. 384, 388; 62 Pac. Rep. 64; *Ex parte Cohn*, 55 Cal. 193; *Ex parte Smith*, 53 Cal. 204. It is true that the court has jurisdiction over the executor or administrator until his final discharge; but no special or express order that the executor or administrator pay over to distributees the money in his hands is authorized or required. The court discharges him from his trust upon proof that it has been fully performed, and payment to the heirs happens to be the last duty in the order of time to be performed. Upon the entry of the decree, the law fixes upon him the duty to pay over, and the court may

compel performance as in the case of any other plain duty resting upon him by virtue of his office: *Estate of Kennedy*, 129 Cal. 384, 387, 388; 62 Pac. Rep. 64.

2. Publication. The statute making provision as to how often publication is to be made applies not only to publications directed by the court, but to those ordered in probate proceedings by the statute, and the word "ordered," in the statute, was probably intended to have the same meaning as the word "required": *Estate of Cunningham*, 73 Cal. 558, 559; 15 Pac. Rep. 136. The phrase, "three weeks successively," in a statute which directs that notice shall be published in a newspaper for three weeks successively, evidently means the same thing as "three successive weeks." In respect to a sale, it simply indicates the time during which the sale must be advertised, and not the manner of publication, as that it shall be published "successively" during the period. The word "successively" refers to weeks, and not to the publications of the paper. Such a case, requiring a notice of the sale of real estate of a decedent to be so published, is, therefore, within the provisions of the statute, one in which the court or judge may order a publication for a less number of times than each issue of the paper in which the notice is to be published: *Estate of Cunningham*, 73 Cal. 558, 559; 15 Pac. Rep. 136; *Estate of O'Sullivan*, 84 Cal. 444, 447; 24 Pac. Rep. 281. It must be observed that the number of publications is not provided by the statute. Section 1705 of the Code of Civil Procedure of California declares, in effect, that the notices provided for by section 1549 of that code must be published as often as the paper is published during the time over which the notice is extended, unless otherwise directed by the court or judge. This mandatory requirement equally applies to both weekly and daily papers. If the publication of a notice is directed to be made in a daily paper, and the court or judge does not otherwise direct, the notice must be published every day that the paper is issued prior to the time fixed, and if not so made, the publication is invalid. But where a publication is to be made for four weeks next preceding the hearing of a designated petition, which hearing was fixed for January 3, 1872, and it appeared that the publication was made on the fifth, twelfth, nineteenth, and twenty-sixth days of December, and January 2, there would be no doubt, if such publication had been made in a weekly newspaper published in the county, that it would have come strictly within the requirements of the statute; but the question before the court was, did the fact that the publication was had in a daily newspaper, once a week for the required time, satisfy the law; and it was held, after a consideration of the authorities, that publications of notice in daily papers once a week, for the time prescribed by the notice, is a sufficient compliance with the law: *People v. Reclamation District*, 121 Cal. 522, 524; 50

Pac. Rep. 1068; 53 Pac. Rep. 1085. An affidavit of publication of a notice of probate proceedings sufficiently shows that the notice was published every day the paper was regularly issued, as required by section 1705 of the Code of Civil Procedure of California, where the affidavit of the publication made is that the notice was published "fourteen consecutive times, to wit, from the 18th day of October, 1889, to and until the 2d day of November, 1889, both days inclusive, on the 18th, 19th, 21st, 22d, 23d, 24th, 25th, 26th, 28th, 29th, 30th, 31st of October, and 1st and 2d days of November, 1889, every day said newspaper was published during said time, Sundays and holidays excepted," where it is admitted that the paper in which said notice was published was not issued on Sundays or holidays, and that therefore the publication in fact complied with the statute: *Estate of Hamilton*, 120 Cal. 421, 430; 52 Pac. Rep. 708.

3. Citations.

(1) **Compared with summons.** The object of a citation, in probate proceedings, is to secure the attendance of parties, but, if this is accomplished by voluntary appearance, the object of the statute is fully subserved: *Rutenick v. Hamakar*, 40 Or. 444; 67 Pac. Rep. 196, 201. It is simply a notice, which may be molded to suit the occasion, and not a process which a party may sue out or not, and which, having sued out, he can serve when he pleases, provided it be done within the statutory time for the service of process. The citation notifies the parties to appear at a time mentioned to show cause. As the court has the power to set the hearing, the citation may of course issue; but there is no alias citation like an alias summons. Unlike a summons, the length of the notice may be prescribed by the court. Otherwise it is five days; and, as a rule, its functions are very unlike those of a summons. The statute in reference to citations shows on its face that no provision in regard to summons applies to citations; and it has been held, in a proceeding to revoke the probate of a will, where the contest was commenced within one year from the probate, by the filing of a valid petition for the revocation thereof, and the issuance of a citation, but which was defectively served, that the court had jurisdiction of a motion to dismiss the proceeding, after the lapse of one year, for want of service of the citation, and that a new citation could issue to the party upon whom the defective service was made, notwithstanding the lapse of one year: *San Francisco etc. Asylum v. Superior Court*, 116 Cal. 443, 453; 48 Pac. Rep. 379. Compare *Bacigalupo v. Superior Court*, 108 Cal. 92; 40 Pac. Rep. 1055.

(2) **Service of.** A citation is to be served in the same manner as a summons: *Ashurst v. Fountain*, 67 Cal. 18; 6 Pac. Rep. 849. A citation, like a summons, is properly served by delivering a copy thereof to the defendant personally: *Hannah v. Green*, 143 Cal. 19, 21; 76

Pac. Rep. 708. If an administrator has been cited to render his final account, the sureties on his undertaking cannot be held liable, unless service of the citation has been made on him: *Ashurst v. Fountain*, 67 Cal. 18; 6 Pac. Rep. 849. Where the order admitting a will to probate, and appointing an executor, recited, among other things, that due proof was made to the satisfaction of the court; that notice had been given of the time appointed for proving said will and for hearing said petition; that citations had been duly issued and served, as required by previous order of the court; and that it appeared to the court that notice had been given according to law to all parties interested, etc.; these recitals, in the absence of any other record evidence of an order that a citation issue to the heirs residing in the county, or of its service, are sufficient to warrant the presumption that such order had been regularly made and that the citations had been duly issued and served. It might be otherwise, if it appeared of record, that an insufficient order relating to the citation had been made, or that the citation issued was not in substantial compliance with the order, or that the mode of service was fatally defective, for, in such a case, it is not to be presumed that a different order was made, or a different citation issued, or that service was made in a different mode, where the record does not show, or purport to show, the form or substance of the order, or of the citation, or the mode of service. Hence the presumption that the order to issue and to serve a citation was regularly made, and that the citation was regularly issued and served, does not contradict the record, in any respect, but is in perfect accord with the recitals of the order admitting the will to probate: *Moore v. Earl*, 91 Cal. 632, 635; 27 Pac. Rep. 1087.

(3) **Same. By publication.** A citation may be served by publication, on one who has departed from the state, in the same manner as a summons in a civil action: *Spencer v. Houghton*, 68 Cal. 82; 8 Pac. Rep. 679; *Trumpler v. Cotton*, 109 Cal. 250; 41 Pac. Rep. 1033; *Heisen v. Smith*, 138 Cal. 216; 94 Am. St. Rep. 39; 71 Pac. Rep. 180. In probate or guardianship proceedings, the citation itself issues only on the order of the court: *Heisen v. Smith*, 138 Cal. 216, 218; 94 Am. St. Rep. 39; 71 Pac. Rep. 180. In a proceeding in a probate court to compel an accounting by a guardian, who has left the state, and who cannot be personally served, neither the guardian nor the sureties are bound by the decree rendered upon the account in the absence of service by publication: *Spencer v. Houghton*, 68 Cal. 82; 8 Pac. Rep. 679. But upon such service being made, a settlement, in the guardian's absence, is binding on his sureties: *Trumpler v. Cotton*, 109 Cal. 250; 41 Pac. Rep. 1033. A citation to a guardian, to make a "report" of his administration, will be construed as requiring the rendition of a final account, where the ward has become of age: *Heisen v. Smith*, 138 Cal. 216, 218; 94 Am. St. Rep. 39; 71 Pac. Rep. 180. Delay of the clerk in issuing a citation does not affect the

validity of the proceedings, provided it is issued before the publication is commenced. If a citation has already been issued, and a new citation is the same in terms as the old one, except as to the change of the return day, it is simply an amendment of the original citation, and is to be so regarded: *Heisen v. Smith*, 138 Cal. 216, 217, 218; 94 Am. St. Rep. 39; 71 Pac. Rep. 180. The omission of the word "seal" in the copy of a citation published is not material. From the nature of things, the seal itself cannot be copied in a printed publication, and hence all that is required is that its presence on the original should be sufficiently indicated. This is usually done by writing the word "seal" in the margin; but it may be otherwise sufficiently indicated, as by the certificate of the clerk contained in the published copy that the seal was attached to the original: *Heisen v. Smith*, 138 Cal. 216, 218; 94 Am. St. Rep. 39; 71 Pac. Rep. 180. While, in this state, the transaction of "judicial business" on Sundays, or holidays, is forbidden, the publication of a citation in a weekly newspaper issued only on Sundays does not come within such prohibition, because such publication is a ministerial act, and not a transaction of "judicial business." Hence such publication does not affect the jurisdiction of the court: *Heisen v. Smith*, 138 Cal. 216, 218; 94 Am. St. Rep. 39; 71 Pac. Rep. 180.

(4) **Personal notice.** When personal notice is required to be given, and no mode of giving it is otherwise prescribed by the statute, it must be given by citation. Personal notice is distinguishable from notice given by publication: *Ashurst v. Fountain*, 67 Cal. 18, 19; 6 Pac. Rep. 849; *Spencer v. Houghton*, 68 Cal. 82, 86; 8 Pac. Rep. 679; *San Francisco etc. Asylum v. Superior Court*, 116 Cal. 443, 451.

(5) **Obedience to, how enforced.** A citation may be issued to require the performance of an act, and disobedience may sometimes be enforced by arrest and imprisonment: *San Francisco etc. Asylum v. Superior Court*, 116 Cal. 443, 451; 48 Pac. Rep. 379, referring to various sections of the Code of Civil Procedure of California. Whenever the executor or administrator of an estate fails to perform any duty required by law, the probate court has the power, by proper orders, to direct and compel the performance of it; and any person interested in the estate as a creditor, or otherwise, may invoke the aid of the court to compel the performance of the duties required by law of executors or administrators: *Stratton v. McCandliss*, 32 Kan. 512; 4 Pac. Rep. 1018, 1021.

(6) **Trial after response.** Under the liberal practice in Washington, as to the form of actions, where a citation has been issued upon a petition, and response is made thereto, and a dismissal of the pro-

ceeding asked for, upon the ground that the court cannot hear it as a probate proceeding, it is not necessary to sustain a demurrer and to dismiss the proceeding on that ground, but the petition may be treated as in the nature of a complaint, issues may be framed thereunder, and the cause be tried without requiring another statement of the same facts, under some other form or name. And, if it develops that it is not a probate proceeding, it will not be treated as such: *In re Murphy's Estate*, 30 Wash. 1; 70 Pac. Rep. 107, 108.

4. Notice, how waived. Service of summons is waived by a general appearance; and where the notice required in probate proceedings serves the purpose of a summons in ordinary actions, it follows, by analogy, that the giving of notice in such proceedings may be rendered unnecessary by the appearance of the parties and their participation in the proceedings. In such case, the purpose of the notice has been served, and one who has appeared and taken part in the hearing will not be heard to say that the court had no jurisdiction to determine his rights: *In re Davis' Estate*, 33 Mont. 539; 88 Pac. Rep. 957, 958.

5. Description once published is sufficient. The statute does not require an order to show cause why a sale of real estate of the decedent should not be made to contain a description of the property. There is no necessity for its containing a description which is given in the petition, and which fully apprises all interested parties, at that stage of the proceedings, of the land proposed to be sold. It is sufficient for the order to refer to the petition on file, where that fully describes the property: *Estate of Roach*, 139 Cal. 17, 20; 70 Pac. Rep. 393.

6. Rules of practice. In Oregon, the proceedings in the county court, when exercising jurisdiction in probate matters, are required to be in writing, and, though no particular pleadings or forms are prescribed, the practice is in the nature of a suit in equity, as distinguished from an action at law: *In re Morrison's Estate*, 48 Or. 612; 87 Pac. Rep. 1043, 1044. Section 1713 of the Code of Civil Procedure of California provides that: "Except as otherwise provided in this title, the provisions of part 2 of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." The title referred to, §§ 1294-1810, contains the entire procedure in probate matters; and part 2, §§ 307-1059, the procedure in civil cases: *San Francisco etc. Asylum v. Superior Court*, 116 Cal. 443, 450; 48 Pac. Rep. 379. By §§ 1713 and 1714, the provisions of part 2 of the Code of Civil Procedure—relating to proceedings in ordinary actions—do not constitute the rules of practice in probate proceedings when "it is otherwise provided"; and the provision of

part 2 — relating to new trials and appeals — are not applicable when "inconsistent" with the provisions of the title in which the sections are found. Hence the particular mode of settling accounts of executors or administrators, specially provided for, being inconsistent with the provisions relating to new trials must be followed: *Estate of Sanderson*, 74 Cal. 199, 205; 15 Pac. Rep. 753. In a proper case, a change of venue may be had from one probate court to another on a trial of an issue of fact: *People v. Almy*, 46 Cal. 245, 248. And, in such a case, the clerk of the court to which the case is sent may certify a transcript of the proceedings and result of the trial back, and the court from which the case was sent can then enter the appropriate judgment with proper recitals: *People v. Almy*, 46 Cal. 245, 248. If a guardian applies for letters of administration against one already appointed as administrator, such guardian is plaintiff and the administrator is defendant: *Estate of Wooten*, 56 Cal. 322, 325. Under the probate practice of California, no such officer as an executor de son tort is recognized: *Dowden v. Pierce*, 73 Cal. 459, 463; 14 Pac. Rep. 302; 15 Pac. Rep. 64. If an administrator has been cited to appear and defend against the allowance of a claim against the estate, but makes default, a return filed twenty days after the hearing, and two days after the entry of the order of default, does not change the character of such order: *In re Carver's Estate*, 10 S. D. 609; 74 N. W. Rep. 1056. It is competent for counsel to stipulate that the order of the county court appointing an administrator may be affirmed on appeal by the circuit court: *In re Skelly's Estate* (S. D.), 113 N. W. Rep. 91, 94. A stipulation that a probate order, judgment, or decree was actually entered at a date prior to its actual entry does not estop the appellant from showing the contrary to sustain his appeal, where the respondents have parted with no right by reason of the stipulation: *Estate of Scott*, 124 Cal. 671, 676; 57 Pac. Rep. 654. The termination of probate proceedings in another state can be shown only by competent evidence, and this evidence must be the records of the probate court, which can be proved only by a properly exemplified or examined copy of such records: *Mears v. Smith* (S. D.), 102 N. W. Rep. 295, 297.

7. Trial in general. In Idaho, the statute provides for a trial "de novo" in the district court, on appeal from the probate court, in probate matters; and this requires that appeals be tried upon the original papers, and upon the same issues had below. If there is no issue, there can be no case made, and it is axiomatic that a cause or an issue cannot be tried de novo that has never been tried: *In re McVay's Estate* (Ida.), 93 Pac. Rep. 28, 32. In California, findings of fact are proper whenever issues of facts are tried by the probate court: *Haffenegger v. Bruce*, 54 Cal. 416; *Estate of Crosby*, 55 Cal. 574. It is not incumbent upon the court, in the settlement of the

accounts of an executor or administrator, to make and file express findings, still, when the account is assailed, in any particular, for matters not appearing upon its face, the court may properly make express findings upon such issues: *Miller v. Lux*, 100 Cal. 609, 613; 35 Pac. Rep. 345, 639. It has never been definitely determined by the supreme court of California that findings are necessary, on the decision of a motion for a probate order, to set apart a homestead, or upon a probate order of sale of real property belonging to the estate of the decedent, and the intimations have rather been that they are not necessary: *Estate of Turner*, 128 Cal. 380, 388; 57 Pac. Rep. 569; 60 Pac. Rep. 965; *Estate of Arguello*, 85 Cal. 151, 152; 24 Pac. Rep. 641. It is clear, however, that no findings are required upon the hearing of ex parte applications for letters of administration which are heard together, where no issues are joined upon either petition: *Estate of Heldt*, 98 Cal. 553, 554; 33 Pac. Rep. 549. In Washington, the statute which requires findings of fact and conclusions of law made by the trial court to be separately stated applies only to actions at law tried without a jury. It does not apply to equitable proceedings or, by analogy, to probate proceedings: *In re Farnham's Estate*, 41 Wash. 570; 84 Pac. Rep. 602, 603. The rules of pleading and practice in civil cases are applicable to proceedings in the probate courts. Issues joined in such proceedings are to be tried and determined by that court as in civil cases; and, upon trial by the court without a jury, parties to the proceedings are entitled to findings unless they are waived; and, if the findings are not waived, it is error to enter judgment without them: *Estate of Burton*, 63 Cal. 36, 37. The court, in every stage of an action, must disregard any defect or error in the proceedings which does not affect the substantial rights of the parties: *In re McVay's Estate (Ida.)*, 93 Pac. Rep. 28. A transfer of the final determinations of a county court, in probate matters, removes the entire cause to the circuit court, where it is tried as if it had been originally instituted therein, except that the review is confined to an examination of the transcript sent up: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 122.

8. Jury trial. Exceptions to an account of an executor or administrator do not create "issues of fact joined," such as must be submitted to a jury on demand of a party in interest: *Estate of Sanderson*, 74 Cal. 199, 209; 15 Pac. Rep. 753. Without the provisions of sections 1716 and 1717 of the Code of Civil Procedure of California, parties to a contest in the probate courts of that state would never be entitled to a jury trial; and the statute is not to be construed as granting an absolute right to a jury trial in cases in which, according to the course of the common law, a jury trial was denied as inappropriate, and especially upon the settlement of accounts of executors or administrators, where so much is left to the mere discretion of the

judge, and in the face of the language of the code, in many sections, implying that the settlement shall be by the court: *Estate of Moore*, 72 Cal. 335, 340; 13 Pac. Rep. 880. But, in that state, the issue of heirship is a proper one to submit to a jury: *Estate of Sheid*, 122 Cal. 528, 532; 55 Pac. Rep. 328. And error in the impanelment of a jury and the submission to it of special issues upon such a question, is not prejudicial, where the court itself has found upon all of the issues submitted to the jury: *Estate of Westerfield*, 96 Cal. 113, 115; 30 Pac. Rep. 1104. Under the statute of Washington, there is no escape from the position that, in a proceeding for the recovery of specific real or personal property, the issues of fact shall be tried by a jury; and this applies to a proceeding by an executor or an administrator to recover from his successor the possession of property, the title of which is put in issue: *In re Murphy's Estate*, 30 Wash. 1; 70 Pac. Rep. 107, 108. In Montana, where objection is made to proceedings for a sale of land of the decedent to pay his debts, those who object are not entitled to a jury trial, unless the issues have first been made up and a written demand made and filed three days prior to the day set for the hearing. Under the statute of that state, it is clearly the duty of the court or judge to try the issues joined without a jury, unless one is demanded in the manner, and within the time, prescribed therein. Those requirements presuppose issues joined before a demand for trial by jury is made. The policy of the law is that proceedings of this nature should progress as speedily as they may, to the end that the affairs of the estate may be closed up, and the parties in interest discharged from the supervision of the court. The presiding judge is not supposed to know what issues, if any, are to be made, until the pleadings are filed, and not then until attention is called to them. If, in any case, no issue of fact is presented, the presence of a jury is unnecessary. The statute, therefore, not only requires the issues to be made up before the demand is made, but, also, that the demand be made a sufficient length of time before the hearing, to secure the attendance of a jury: *In re Tuohy's Estate*, 33 Mont. 230; 83 Pac. Rep. 486, 489.

9. Attorney for absent heirs. The section of the California statute respecting this matter was repealed in 1903, but as some of the states considered in this work may still have such a section in their codes, we refer to a few of the California cases upon that subject. The appointment of an attorney for absent heirs, and the allowance to him of a fee, are matters entirely within the discretion of the probate court, and if such allowance be improvident or indiscreet, the court may vacate it on the suggestion of anyone, or on its own motion: *Estate of Rety*, 75 Cal. 256, 257; 17 Pac. Rep. 65; *Estate of Lux*, 134 Cal. 3; 66 Pac. Rep. 30. The allowance of a fee of fifty dollars for the services of an attorney for absent heirs, appointed by

the court to represent them in proceedings to obtain an order for the sale of real estate, is not unusual or excessive: *Estate of Simmons*, 43 Cal. 543, 547. The fee of the attorney shall be paid from the portion of the heir, legatee, or devisee represented, as a necessary part of the expenses of administration, and until the payment of the general expenses of the administration of the estate and the debts of the deceased, there can be no portion, of the party represented, from which such payment can be made. The attorney so appointed stands in no better position than the person whom he represents, and his compensation is dependent upon the existence of a fund or property belonging to such person. Until the payment of the general expenses of administration, and the debts of the deceased, there can be no such fund or property: *Estate of Carpenter*, 146 Cal. 661, 666; 80 Pac. Rep. 1072. The charge for the services of such an attorney is to be made against the interest represented by the attorney, and the statute authorizes payment out of the estate only where the estate can be re-imbursed by retaining the amount from the portion of the heir represented: *Estate of Lux*, 134 Cal. 3, 8; 66 Pac. Rep. 30. When an attorney has been appointed to represent an absent heir, nothing should be paid to such attorney, if such person does not turn out to be an heir: *Estate of Lux*, 134 Cal. 3, 8; 66 Pac. Rep. 30. It is evident that an attorney cannot be appointed for an absent heir, who is already represented by an attorney. As soon as the absent heir is represented by an attorney employed by himself, the functions of an appointee cease. The order of appointment must specify the names of the parties, so far as known, for whom the attorney is appointed, who is thereby authorized to represent such parties in all such proceedings had subsequent to his appointment. The appointment is authorized only for a devisee, legatee, heir, or creditor. Before the appointment can be made, the court must be satisfied that such persons exist, and the order must designate who they are, or otherwise the fee allowed cannot be charged to the person represented by the attorney. If the names are not known, they must still be identified, in some way, in the order: *Estate of Lux*, 134 Cal. 3, 6, 7; 66 Pac. Rep. 30. The attorney for minor heirs can represent them only in a proceeding which has been duly inaugurated, and in which the court has already jurisdiction of the minors, by such summons or notice as the code provides. He cannot waive their rights, or, by any of his acts, invest the courts with jurisdiction of their persons, which it had not already acquired: *Campbell v. Drais*, 125 Cal. 253, 258; 57 Pac. Rep. 994. The attorney for minors in probate proceedings is to "represent" them. The general provisions in relation to guardians ad litem, in the chapter on parties to civil actions, do not apply to probate proceedings. The matter is governed by special proceedings as to attorneys for minors: *Carpenter v. Superior Court*, 75 Cal. 596, 599; 19 Pac. Rep. 174.

10. Costs.

(1) **In general.** The priority of the United States attaches only to the net proceeds of the property of the deceased, after proper charges and expenses of administration are satisfied; but the costs and expenses of defending an action, where the claim should have been allowed, are not to be included in the expenses of administration: *United States v. Eggleston*, 4 Saw. 199; 25 Fed. Cas., No. 15,027. In a contest over the accounts of an executor, the contestants are entitled to their costs, where the court below deducted a considerable sum, and then allowed the balance of the accounts: *In re Millenovich*, 5 Nev. 161, 188. Costs cannot be allowed, except as an incident to some judgment or order of the court: *Henry v. Superior Court*, 93 Cal. 569, 572; 29 Pac. Rep. 230.

REFERENCES.

Liability of executors and administrators for costs: See note § 655, division I, head-line 1, subd. 4.

(2) **Are statutory.** The superior court, acting in probate proceedings, obtains its authority to award costs from the statute, and not by virtue of its general probate jurisdiction. Its power to award costs is confined to the terms of the statute: *Henry v. Superior Court*, 93 Cal. 569, 571; 29 Pac. Rep. 230; *Estate of Olmstead*, 120 Cal. 447, 453; 52 Pac. Rep. 804.

(3) **Discretion of court.** The probate court is clothed with discretion to order costs to be paid "by any party to the proceedings, or out of the assets of the estate, as justice may require." This discretion cannot be exercised until there is something upon which it may be based; and all the provisions of the code bearing upon the subject of probate contests, indicate that good faith and reasonable cause are the things to be inquired into by the court in the exercise of its discretion: *Henry v. Superior Court*, 93 Cal. 569, 572; 29 Pac. Rep. 230.

(4) **Do not include attorneys' fees.** Attorneys' fees are not, in any proper sense, a part of the costs in a probate case: *Henry v. Superior Court*, 93 Cal. 569; 29 Pac. Rep. 230; *Estate of Olmstead*, 120 Cal. 447, 454; 52 Pac. Rep. 804. A later statute as to costs, must prevail in probate proceedings, especially where such statute is included in the provisions which relate specifically to proceedings in probate: *Estate of Olmstead*, 120 Cal. 447, 452; 52 Pac. Rep. 804.

(5) **No amendment of judgment to include.** If a probate decree is silent as to the matter of costs, such judgment cannot afterwards be amended nunc pro tunc, by the court, so as to include costs: *Estate*

of Potter, 141 Cal. 424, 426; 75 Pac. Rep. 850. The principle in such cases is that, if the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper judgment, it has no power to remedy such error by ordering an amendment, *nunc pro tunc*, of a proper judgment: Estate of Potter, 141 Cal. 424, 426; 75 Pac. Rep. 850.

(6) **Contesting probate of will.** Until a will has been admitted to probate, or probate has been denied, the court has no power to appropriate the funds of an estate to aid either the proponent or contestant: *Henry v. Superior Court*, 93 Cal. 569, 573; 29 Pac. Rep. 230; Estate of McKinney, 112 Cal. 447, 453; 44 Pac. Rep. 743. When there is a successful contest after probate, the court, in its discretion, may allow to the executors, out of the estate, their reasonable costs and expenditures in endeavoring to uphold the will of which they had been appointed the executors: Estate of McKinney, 112 Cal. 447; 44 Pac. Rep. 743. And where there is a successful contest before probate, and the legatees or executors acted in good faith, and upon probable grounds in proposing the will for probate, the court may, in its discretion, allow to the unsuccessful proponents all ordinary costs incurred in endeavoring to establish the will and make the same a charge against the assets of the estate: Estate of Olmstead, 120 Cal. 447; 52 Pac. Rep. 804. So there may be cases in which the duty of a widow, or other person entitled to administration of an estate, in case of intestacy, to contest the probating of an alleged will, might be as plain and urgent, under the circumstances known to such person, as would be the duty of an executor already appointed, or one nominated as executor in a will offered for probate, or a legatee thereunder, to oppose a contest and endeavor to establish such will; and the broad and comprehensive terms of the provision of the code which provides that in probate proceedings in general a superior court, "may, in its discretion, order costs to be paid by any party to the proceeding, or out of the assets of the estate as justice may require," applies as well to a party contesting a will as to one opposing it. The statute puts the entire matter of costs within the sound discretion of the court, and such discretionary power extends to and includes the case of an unsuccessful contestant. It is only in rare and extreme cases, however, that the court is justified in ordering the costs of an unsuccessful contestant to be paid out of the estate: Estate of Bump (Cal.), 92 Pac. Rep. 642. The court may direct costs to be paid out of the funds of the estate, where an executor or administrator, on the complaint of an heir, has been removed for mismanagement: Estate of Mullins, 47 Cal. 450, 452.

(7) **Action against co-executor.** If an heir brings an action against a surviving executor to compel him to make good the default of a

deceased co-executor, the defendant in such action cannot recover his costs incurred therein from the sureties on the bond of his deceased co-executor: *Hewlett v. Beede*, 2 Cal. App. 561; 83 Pac. Rep. 1086, 1089.

(8) **Presumption on appeal.** Where a case is presented upon the proposition that the power does not exist, in any way, or under any circumstances, to make the costs of an unsuccessful contest of a will payable out of the assets of the estate, the presumptions are all in favor of the action of the court below. The power does exist, and in the absence of any showing to the contrary, it must be presumed that it was properly exercised: *Estate of Bump*, 152 Cal. 271; 92 Pac. Rep. 642, 643.

11. **Disposition of life estates, etc.** The proceedings under sections 1723 of the Code of Civil Procedure of California for a decree adjudging that a life estate, created under the will of a deceased person, has been terminated by reason of the death of the one to whom it was granted, partake of the nature of proceedings in rem. The petition is addressed to the superior court, and not to the probate court, and is similar to a complaint or petition in equity: *Matter of Tracey*, 136 Cal. 385, 388; 69 Pac. Rep. 20; *Estate of De Leon*, 102 Cal. 537, 541; 36 Pac. Rep. 864. But, although the proceeding is improperly entitled as a probate cause, yet if the facts stated in the petition, notwithstanding its title, are such as entitle it to be treated as a complaint in equity, it will be so treated, and, if the allegations thereof are sufficient in all respects to justify the relief granted, the court having jurisdiction of the subject-matter and of the parties may grant the proper relief: *Estate of De Leon*, 102 Cal. 537, 541; 36 Pac. Rep. 864. The jurisdiction of the court to render the decree, in such case, so as to bind all persons interested in the property, depends upon notice being given to them as required by the statute; and, in all cases in which the statute allows a constructive service, or in which jurisdiction may be obtained of a thing by a prescribed form of notice, in which the real party in interest had no actual notice, and did not appear or subject himself to the jurisdiction of the court, the mode of service prescribed by the statute must be strictly pursued: *Matter of Tracey*, 136 Cal. 385, 390; 69 Pac. Rep. 20. Where a petition was filed under the section above named, setting up an alleged right of homestead, and praying that it be decreed that the said alleged homestead property vested in petitioner by reason of the death of her husband, and the court made an order fixing a certain time and place for the hearing of the petition, and that "notice of said hearing be given by the posting of this order in three of the most prominent places in said county," naming them, more than ten days prior to the day fixed for the hearing, but there was no notice directed to any person or to any class of persons, such

notice given was radically defective and did not give to the court any jurisdiction to hear the proceeding or to render a decree: *Hansen v. Union Sav. Bank*, 148 Cal. 157, 160; 82 Pac. Rep. 768. The said section 1723 was only intended as a proceeding to have it determined that a certain person is dead, upon whose death the asserted right of another person depends, and not to have the validity of the right conclusively adjudicated. The decree in the proceeding merely determines that, if the party petitioning has any asserted right or title accruing on the death of another person, such asserted right or title has accrued. The court is not given power under that section to declare in whom, upon the termination of a life estate, title is vested absolutely. It is empowered to make a decree that the life estate of a deceased party has absolutely terminated: *Hansen v. Union Sav. Bank*, 148 Cal. 157, 160; 82 Pac. Rep. 768. But the statute seems to contemplate a difference in the terms of a decree between cases where a life estate has terminated, and homestead or community property has vested in the survivor of a marriage, by reason of death.

PART XIV.

PUBLIC ADMINISTRATOR.

CHAPTER I.

PUBLIC ADMINISTRATOR.

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- § 845. Duty of persons in whose house any stranger dies.
- § 846. Inventory. How to administer estates.
- § 847. Must deliver up estate when.
- § 848. Notice to, by civil officers, of waste.
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- § 850. Order on public administrator to account.
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- § 852. Disposition of moneys. Escheat, etc.
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- § 859. To file reports. Penalty. Duty of district attorney.

PUBLIC ADMINISTRATORS.

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| 2. Right to letters. | (3) Cannot contest probate of will. |
| (1) In general. | (4) May contest another's right to administer. |
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| 3. Oath and bond. | |
| 4. Powers, duties, and liabilities. | 5. Compensation. |
| (1) In general. | 6. Appeal. |

§ 843. **To take charge of what estates.** Every public administrator, duly elected, commissioned, and qualified, must take charge of the estates of persons dying within his county, as follows:

1. Of the estate of decedents for which no administrators are appointed, and which, in consequence thereof, are being wasted, uncared for, or lost;
2. Of the estate of decedents who have no known heirs;
3. Of the estates ordered into his hands by the court; and
4. Of the estates upon which letters of administration have been issued to him by the court. **Kerr's Cyc. Code Civ. Proc., § 1726.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho. Code Civ. Proc. 1901, sec. 4324.

Montana.* Pol. Code, sec. 4510.

Nevada. Comp. Laws, secs. 2374, 2383.

North Dakota. Rev. Codes 1905, § 2549.

§ 844. **To obtain letters, when and how. Bond and oath.** Whenever a public administrator takes charge of an estate, which he is entitled to administer without letters of administration being issued, or under order of the court, he must, with all convenient dispatch, procure letters of administration thereon, in like manner and on like proceedings as letters of administration are issued to other persons. His official bond and oath are in lieu of the administrator's bond and oath; but when real estate is ordered to be sold, another bond may be required by the court. **Kerr's Cyc. Code Civ. Proc., § 1727.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho. Code Civ. Proc. 1901, sec. 4325.

Montana. Pol. Code, sec. 4511.

Nevada. Comp. Laws, sec. 2383.

North Dakota. Rev. Codes 1905, § 2551.

§ 845. **Duty of persons in whose house any stranger dies.** Whenever a stranger, or person without known heirs, dies intestate in the house or premises of another, the possessor

of such premises, or any one knowing the facts, must give immediate notice thereof to the public administrator of the county; and in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator, or any party interested. **Kerr's Cyc. Code Civ. Proc., § 1728.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Code Civ. Proc. 1901, sec. 4326.

Montana.* Pol. Code, sec. 4512.

§ 846. Inventory. How to administer estates. The public administrator must make and return a perfect inventory of all estates taken into his possession, administer and account for the same according to the provisions of this title, subject to the control and directions of the court. **Kerr's Cyc. Code Civ. Proc., § 1729.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho. Code Civ. Proc. 1901, sec. 4327.

Montana.* Pol. Code, sec. 4513.

§ 847. Must deliver up estate when. If, at any time, letters testamentary or of administration are regularly granted to any other person on an estate of which the public administrator has charge, he must, under the order of the court, account for, pay, and deliver to the executor or administrator thus appointed, all the money, property, papers, and estate of every kind in his possession or under his control. **Kerr's Cyc. Code Civ. Proc., § 1730.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Code Civ. Proc. 1901, sec. 4328.

Montana.* Pol. Code, sec. 4514.

North Dakota. Rev. Codes 1905, § 2554.

§ 848. Notice to, by civil officers, of waste. All civil officers must inform the public administrator of all property known to them, belonging to a decedent, which is liable to loss, injury, or waste, and which, by reason thereof, ought

to be in the possession of the public administrator. **Kerr's Cyc. Code Civ. Proc.**, § 1731.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Code Civ. Proc. 1901, sec. 4329.

Montana.* Pol. Code, sec. 4515.

Nevada. Comp. Laws, sec. 2379.

North Dakota. Rev. Codes 1905, § 2552.

§ 849. **Suits for property of decedents.** The public administrator must institute all suits and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent. **Kerr's Cyc. Code Civ. Proc.**, § 1732.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Code Civ. Proc. 1901, sec. 4330.

Montana.* Pol. Code, sec. 4516.

Nevada. Comp. Laws, sec. 2379.

North Dakota. Rev. Codes 1905, § 2553.

§ 850. **Order on public administrator to account.** The court may, at any time, order the public administrator to account for and deliver all the money and property of an estate in his hands to the heirs, or to the executors or administrators regularly appointed. **Kerr's Cyc. Code Civ. Proc.**, § 1735.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Code Civ. Proc. 1901, sec. 4333.

Montana.* Pol. Code, sec. 4519.

§ 851. **When to make and publish return of condition of estate.** The public administrator, or any person who received letters of administration while acting as public administrator, must, once in every six months, make to the superior court, under oath, a return of all the estates of decedents which have come into his hands, the value of each estate, the money which has come into his hands from every such estate, and what he has done with it, and the amount of his fees, and expenses incurred in each estate, and the balance, if any, in each such case remaining in his hands; publish the same

six times in some newspaper published in the county, or if there is none, then post the same, legibly written or printed, in the office of the county clerk of the county. One copy of the return must be filed with papers in each estate so reported. **Kerr's Cyc. Code Civ. Proc.**, § 1736.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho. Code Civ. Proc. 1901, sec. 4334.

Montana. Pol. Code, sec. 4520.

Nevada. Comp. Laws, sec. 2375.

§ 852. **Disposition of moneys. Escheat, etc.** It is the duty of every public administrator, as soon as he receives the same, to deposit with the county treasurer of the county in which the probate proceedings are pending, all moneys of the estate; and such moneys may be drawn upon the order of the public administrator, countersigned by a superior judge, when required for the purposes of administration. It is the duty of the county treasurer to receive and safely keep all such moneys, and pay them out upon the order of the public administrator, when countersigned by a superior judge, and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and the county treasurer must be allowed one per cent upon all moneys received and kept by him, and no greater fees for any services herein provided; and for the safe-keeping and payment of all such moneys, as herein provided, the said treasurer and his sureties are responsible upon his official bond.

The moneys thus deposited may, upon order of the court, be invested, pending the proceedings, in securities of the United States, or of this state, when such investment is deemed by the court to be for the best interests of the estate. After a final settlement of the affairs of any estate, if there are no heirs, or other claimants thereof, the county treasurer must pay into the state treasury all moneys and effects in his hands belonging to the estate, upon order of the court; and if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 506), § 1737.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Idaho. Code Civ. Proc. 1901, sec. 4335.

Montana. Pol. Code, sec. 4521.

Nevada. Comp. Laws, secs. 2376, 2382.

§ 853. **Not to be interested in payments, etc.** The public administrator must not be interested in the expenditures of any kind made on account of any estate he administers; nor must he be associated, in business or otherwise, with any one who is so interested, and he must attach to his report and publication, made in accordance with the preceding section, his affidavit to that effect. **Kerr's Cyc. Code Civ. Proc., § 1738.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho. Code Civ. Proc. 1901, sec. 4336.

Montana.* Pol. Code, sec. 4522.

Nevada. Comp. Laws, sec. 2377.

§ 854. **When to settle with county clerk.** **Disposition of unclaimed estate.** Public administrators are required to account, under oath, and to settle and adjust their accounts relating to the care and disbursement of money or property belonging to estates in their hands, with the county clerks of their respective counties, on the first Monday in January and July in each year; one copy of said account to be filed with the papers in each of such estates; and they must pay to the county treasurer any money remaining in their hands of an estate unclaimed, as provided in sections sixteen hundred and ninety-three to sixteen hundred and ninety-six, both inclusive. **Kerr's Cyc. Code Civ. Proc., § 1739.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Montana. Pol. Code, sec. 4523.

Nevada. Comp. Laws, sec. 2376.

§ 855. **Proceedings against, for failure to pay over money.** When it appears, from the returns made in pursuance of the foregoing sections, that any money remains in the hands of

the public administrator (after a final settlement of the estate) unclaimed, which should be paid over to the county treasurer, the superior court, or a judge thereof, must order the same to be paid over to the county treasurer; and on failure of the public administrator to comply with the order within ten days after the same is made, the district attorney for the county must immediately institute the requisite legal proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of money so withheld, and costs. **Kerr's Cyc. Code Civ. Proc.**, § 1740.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho. Code Civ. Proc. 1901, sec. 4337.

Montana.* Pol. Code, sec. 4524.

Nevada. Comp. Laws, sec. 2378.

§ 856. **Payment of fees of officers.** The fees of all officers chargeable to estates in the hands of public administrators must be paid out of the assets thereof, so soon as the same come into his hands. **Kerr's Cyc. Code Civ. Proc.**, § 1741.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Pol. Code, sec. 4525.

§ 857. **To administer oaths.** Public administrators may administer oaths in regard to all matters touching the discharge of their duties, or the administration of estates in their hands. **Kerr's Cyc. Code Civ. Proc.**, § 1742.

ANALOGOUS AND IDENTICAL STATUTES

The * indicates identity.

Montana.* Pol. Code, sec. 4526.

§ 858. **Application of preceding chapters.** When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties, or for the administration of an estate in his hands, the provisions of the preceding chapters of this title must govern. **Kerr's Cyc. Code Civ. Proc.**, § 1743.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Code Civ. Proc. 1901, sec. 4338.**Montana.** Pol. Code, sec. 4528.**Nevada.** Comp. Laws, sec. 2380.**§ 859. To file reports. Penalty. Duty of district attorney.**

Every public administrator, or person who holds letters of administration, who was appointed while acting as public administrator, who fails to comply with the provisions of sections seventeen hundred and thirty-five, seventeen hundred and thirty-six, and section seventeen hundred and thirty-nine of this code, is guilty of a misdemeanor; and upon conviction thereof, shall be punished by a fine not less than one hundred dollars for each offense; and it shall be the duty of the district attorney of the county to see that the provisions of this chapter are fully complied with. **Kerr's Cyc. Code Civ. Proc., § 1744.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Nevada. Comp. Laws, sec. 2378.**PUBLIC ADMINISTRATORS.**

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|-------------------------------------|--|
| 1. Character of office. | (2) Duty as to state moneys, escheat, etc. |
| 2. Right to letters. | (3) Cannot contest probate of will. |
| (1) In general. | (4) May contest another's right to administer. |
| (2) Competency. | (5) Right to writ of prohibition. |
| (3) Preference. | (6) "Return" of condition of estate. |
| (4) Discretion of court. | (7) Personal liability on contracts. |
| (5) In case of foreign will. | |
| (6) Conflict of jurisdiction. | |
| (7) Issuance of letters. | |
| 3. Oath and bond. | |
| 4. Powers, duties, and liabilities. | 5. Compensation. |
| (1) In general. | 6. Appeal. |

1. Character of office. The public administrator is a county officer, and must perform the duties prescribed by law. If no specific direction is given for his government or guidance in the discharge of his duties, or for the administration of an estate in his hands, those provisions relating to administrators generally must govern. He obtains letters of administration, not as an individual, but as public

administrator, by virtue of his office, whether such letters are issued to him upon his own application, or are issued to him by order of the court. The purpose of the law is to provide a public officer, acting under oath of office and an official bond, who shall be in a position, at all times, to administer an estate where there is a failure of heirs or other persons competent to perform the services: *Los Angeles County v. Kellogg*, 146 Cal. 590; 80 Pac. Rep. 861. The right of the public administrator to administer upon an estate is a right attached to the officer as distinguished from the office. This is apparent from the fact that, upon the expiration of his term of office, if the estate be not finally closed, he continues as administrator of it: *Estate of Lermond*, 142 Cal. 585, 586; 76 Pac. Rep. 488; *Los Angeles County v. Kellogg*, 146 Cal. 590; 80 Pac. Rep. 861, 863.

REFERENCES.

Concerning public administrators, see notes *Kerr's Cyc. Code Civ. Proc.*, §§ 1726-1744.

2. Right to letters.

(1) **In general.** It is competent for the public administrator, as such, to petition for, and by the order of the probate court to receive, letters of administration upon the estate of an intestate: *Estate of Morgan*, 53 Cal. 243, 244. The court exceeds its jurisdiction in appointing the public administrator as special administrator, and in ordering the estate of the decedent into the public administrator's charge, where one who is next of kin, and to whom the statute has given a prior right to the office of both general and special administrator, seeks such appointment: *In re Ming*, 15 Mont. 79; 38 Pac. Rep. 228, 232. A public administrator of the county of a decedent's residence at the time of his death is entitled to letters of administration, although the proceedings have been transferred to another county, and the public administrator of that county has also applied for letters: *Estate of Graves* (Cal. App.), 96 Pac. Rep. 792, 794.

REFERENCES.

Right of public administrator to appointment in certain cases: See note § 266, head-line 19, ante. That a corporation may be appointed to act as administrator: See notes *Kerr's Cyc. Code Civ. Proc.*, § 1348.

(2) **Competency.** In appointing a public administrator to take charge of an estate, the court is not limited to the estates of such persons as die within his county, but he is competent to administer upon the estate within his county of any decedent irrespective of the place of death: *Estate of Hickman*, 101 Cal. 609; 36 Pac. Rep. 118; *Estate of Richardson*, 120 Cal. 344, 347; 52 Pac. Rep. 832. A statute which provides that "the administrator must not be interested in the

expenditures of any kind, made on account of any estate he administers," does not state a rule of disqualification, and does not render incompetent, as public administrator, one who became a creditor of the estate before his appointment, as by furnishing the coffin and burial outfit for the deceased: *Estate of Muersing*, 103 Cal. 585, 587; 37 Pac. Rep. 520. If the term of office of a public administrator expires before the hearing of his petition for letters of administration, he is incompetent to administer upon the estate. It is his status at the time of the granting of his administration, and not at the time of filing his petition, that determines his competency: *Estate of Pingree*, 100 Cal. 78, 81; 34 Pac. Rep. 521; but see *Los Angeles County v. Kellogg*, 146 Cal. 590; 80 Pac. Rep. 861, 863, that he retains his official character while acting under letters of appointment, so far as a particular estate is concerned, even though his term of office has expired.

(3) **Preference.** A public administrator is entitled to letters of administration in preference to the nominee of a non-resident heir of an intestate decedent: *Hyde v. Cutler*, 64 Cal. 228; 30 Pac. Rep. 804; *Estate of Beech*, 63 Cal. 458, 460. He is preferred to the nominee of a married daughter of the intestate: *Estate of Kelly*, 57 Cal. 81, 82. He is also entitled to letters of administration in preference to creditors: *Hyde v. Cutler*, 64 Cal. 228; *Estate of McKinnon*, 64 Cal. 226; and see *Estate of Doak*, 46 Cal. 573. If a person, who is public administrator, applies for letters of administration as a creditor, he is not thereby estopped from making an application therefor in his official capacity: *Estate of McKinnon*, 64 Cal. 226, 227. Brothers of the decedent are entitled to letters of administration only when they are entitled to "succeed" to the estate or some portion thereof. Hence, their nominee, where such brothers are not entitled to administer on the estate of the decedent, and who are merely devisees of the deceased mother, who was the sole heir of their deceased sister, is not entitled to letters of administration as against the public administrator: *Estate of Wakefield*, 136 Cal. 110, 111; 68 Pac. Rep. 499. A public administrator is not entitled to letters of administration as against the guardian of an incompetent person, where such guardian was entitled, at the time of the death, to such letters: *Estate of McLaughlin*, 103 Cal. 429; 37 Pac. Rep. 410.

(4) **Discretion of court.** In a contest between certain creditors and a public administrator as to which shall administer, it is discretionary with the court to make the appointment: *Estate of Doak*, 46 Cal. 573.

REFERENCES.

Discretion of court in case of foreign will: See subd. (5), *infra*.

(5) **In case of foreign will.** In the case of a foreign will the public administrator is not "entitled" to letters of administration. This rule is apparently based upon the fact that he is not "interested in the will": *Estate of Brundage*, 141 Cal. 538, 541; 75 Pac. Rep. 175. Upon the admission to probate, in this state, of the copy of a will that has been admitted to probate in another jurisdiction, if there is no one here who is entitled to letters of administration, it is within the discretion of the court to appoint the public administrator: *Estate of Richardson*, 120 Cal. 344, 346; 52 Pac. Rep. 832. On the probate of a foreign will in this state, in the absence of a petition by the executor named in the will, letters of administration must be granted to the "person interested" in the will who applies for them, to the exclusion of the public administrator: *Estate of Bergin*, 100 Cal. 376; 34 Pac. Rep. 867, 868; *Estate of Engle*, 124 Cal. 292; 56 Pac. Rep. 1022. If the devisee is "interested" in the will so far as to entitle him to letters of administration as against the public administrator, it follows that his assignee is likewise entitled to letters in preference to the public administrator: *Estate of Engle*, 124 Cal. 292; 56 Pac. Rep. 1022, 1023. But where the person who is entitled to letters testamentary upon application therefor fails to make application, in the case of a foreign will, and there is no statutory provision requiring the court to appoint the nominee of the executor named in such will, or of any resident devisee, the court has jurisdiction to appoint the public administrator, instead of such nominee: *Estate of Richardson*, 120 Cal. 344; 52 Pac. Rep. 832. If a foreign executor announces his right to letters testamentary in this state, and he is not the surviving husband or wife of the deceased, the public administrator, as between himself and the appointee of such foreign executor, has the prior right to be granted letters of administration with the will annexed: *Estate of Garber*, 74 Cal. 338, 340; 16 Pac. Rep. 233.

(6) **Conflict of jurisdiction.** Jurisdiction in the matter of the appointment of a public administrator attaches upon the filing of the first petition, where a non-resident has died leaving property in two or more countries, to the superior court in which the petition is filed, and continues during the pendency of the proceeding thus instituted; and this jurisdiction is exclusive, precluding any other court from effectually acting in the matter. Hence where a petition for appointment in such a case is filed in one superior court, an administrator subsequently appointed upon application in another superior court, is not a party in interest, entitled to oppose the appointment of the administrator in the county wherein jurisdiction first attached: *Estate of Davis*, 149 Cal. 485, 487; 87 Pac. Rep. 17, 18. See, also, *Dungan v. Superior Court*, 149 Cal. 98; 117 Am. St. Rep. 119; 84 Pac. Rep. 767.

(7) **Issuance of letters.** After a grant of administration has been regularly made to a public administrator, there is no necessity for the actual issuance of letters to him, to authenticate his title, where he was duly authorized to administer by the judgment of a court having jurisdiction: *Abel v. Love*, 17 Cal. 233, 238. If a person presents a petition, in his official character, for letters of administration, and his claim to such letters is based upon the fact that he is a public administrator, and the judge acts upon such petition, and it is that petition under which the petitioner is appointed, it must be held that the letters were issued to the petitioner in his official character as public administrator, and not to him personally: *Mitchell v. Hecker*, 59 Cal. 558, 560. An order directing letters to be issued to one as public administrator upon his qualifying, in the manner provided by law, is only one step towards his appointment. It does not, of itself, vest him with the office. His appointment is in fieri until he has qualified and received his letters. If it appears that he has never taken the oath of office, and that no letters were issued to him, no grant of administration is shown: *Estate of Hamilton*, 34 Cal. 464, 469.

3. Oath and bond. Where it is expressly declared by statute that the official bond and oath of the public administrator are in lieu of the administrator's bond and oath, it is not incumbent upon the court to require, in the first instance, upon application for letters of administration, or at all, a bond, in twice the amount of the value of the personal property of the estate: *Healy v. Superior Court*, 127 Cal. 659, 662; 60 Pac. Rep. 428.

4. Powers, duties, and liabilities.

(1) **In general.** A public administrator has only such powers as are given him by law: *Beckett v. Selover*, 7 Cal. 215; 68 Am. Dec. 237. He is not entitled to administer upon every estate, and must have a judicial grant of administration in every particular case of which his official commission is not proof. He must show the grant of administration like every other administrator: *Beckett v. Selover*, 7 Cal. 215; 68 Am. Dec. 237; *Rogers v. Hoberlein*, 11 Cal. 120, 128; *Estate of Hamilton*, 34 Cal. 464. A public administrator does not, by virtue of his office acquire the right to administer upon any particular estate. He can take upon himself the duties of an administrator of any given estate only by a special grant from the probate court, made upon a petition filed in the matter of such estate: *Estate of Hamilton*, 34 Cal. 464, 468. He is competent to administer on the estate within his county, of any decedent, irrespective of the place of the latter's death: *Estate of Richardson*, 120 Cal. 344, 347; 52 Pac. Rep. 832, 833. A man, who assumes to be a public administrator, but who does not give the official bond required by law, and who is not even under

the sanction of an oath of office, but who undertakes the administration of the estate, and continues therein, and makes a sale of land thereof after the election of a public administrator, cannot be said to represent the interest of the minors, in such a way as to raise the bar of the statute of limitations against them: *Staples v. Connor*, 79 Cal. 14; 21 Pac. Rep. 380. No burden is imposed upon a public administrator of administering estates which have been transferred to his county by reason of the disqualification of the judge of a superior court of an adjoining county: *Estate of Graves* (Cal. App.), 96 Pac. Rep. 792, 794. The administration of an estate commenced by a public administrator, and not completed when his term of office expires, is to be completed by him, and does not devolve on his successor. His authority to act continues until it is directly set aside, or is indirectly revoked by another appointment: *In re Cragie's Estate*, 24 Mont. 37; 60 Pac. Rep. 495, 497; *Rogers v. Hoberlein*, 11 Cal. 120; and the sureties on his bond remain liable: *Estate of Aveline*, 53 Cal. 259. If a public administrator succeeds himself in office, the sureties on his second official bond are not answerable for his acts as administrator of any estate he represented during his first term: *O'Rourke v. Harper*, 35 Mont. 346; 89 Pac. Rep. 65, 66. The public administrator of one county is not authorized to petition for the revocation of letters issued to the public administrator of another county: *Estate of Griffith*, 84 Cal. 107, 110; 23 Pac. Rep. 528; 24 Pac. Rep. 381.

(2) **Duty as to state moneys, escheats, etc.** The public administrator is authorized to take charge of estates of persons dying intestate without known heirs. All persons are required to notify the public administrator of the existence of such estates; and the public administrator is required to administer upon such estates. He is required to keep the moneys of such estates on deposit in the county treasury, to pay them out only upon an order of the probate court and, after the final settlement, the balance shall be paid into the state treasury upon an order of the court, if there are no heirs or other claimants. In such estates, the public administrator is required to render his final account, and, upon the settlement of the final account, the probate court must proceed to distribute the estate. Such distribution is final, and must be made to the persons entitled thereto. After a final settlement of the affairs of any estate, if there are no heirs, or other claimants thereof, the county treasurer shall pay into the state treasury all moneys and effects in his hands belonging to the estate, upon order of the court; and, if any such moneys and effects escheat to the state, they must be disposed of as other escheated estates: *Estate of Miner*, 143 Cal. 194, 202; 76 Pac. Rep. 968.

REFERENCES.

Duty of public administrator as to the state moneys, escheats, etc.: See *Kerr's Cyc. Code Civ. Proc.*, § 1737

(3) **Cannot contest probate of will.** The public administrator is not interested in the estate in such a way as to enable him to contest the probate of a will. The probate of a will can be contested only upon "written grounds of opposition" filed by a "person interested," that is, interested in the estate, and not in the mere fees of an administration thereof. A public administrator has no interest in an estate, nor in the probate of a will. That is a matter which concerns only those to whom the estate would otherwise go: *Estate of Sanborn*, 98 Cal. 103; 32 Pac. Rep. 865, 866; *Estate of Hickman*, 101 Cal. 609, 612; 36 Pac. Rep. 118; *State v. District Court*, 34 Mont. 226; 85 Pac. Rep. 1022.

(4) **May contest another's right to administer.** The public administrator of one county is entitled to contest the right of another public administrator to administer upon an estate in the superior court of the county of which the applicant is the public administrator, and the conflicting claims of the applicants must be determined by ascertaining the residence of the deceased at the time of his death: *Estate of Graves* (Cal. App.), 96 Pac. Rep. 792, 793.

(5) **Right to writ of prohibition.** Where applications for letters of administration are made in different counties, upon conflicting claims as to the fact of residence, the superior court of the county in which a petition is first filed has exclusive jurisdiction to determine the question of residence and the courts of other counties must abide the determination of that court, which is reviewable only upon appeal. There cannot be two valid administrations at the same time in this state. Hence where the public administrator and the next of kin of decedent have applied for letters of administration on the estate of a non-resident decedent, they have such an "interest" as to entitle them to maintain a proceeding for a writ of prohibition to prevent another court from assuming jurisdiction of the same estate: *Dungan v. Superior Court*, 149 Cal. 98; 84 Pac. Rep. 767, 768, 769.

(6) **"Return" of condition of estate.** Where the statute requires the public administrator to make and to publish, semi-annually, a "return" of the condition of all estates which have come into his hands, under oath, such "return" is not to be treated as an account stated. It is wholly different from the accounts required to be made by administrators, and for a wholly different purpose. It was not intended to, and does not, take the place or serve the purpose of the semi-annual accounts required of executors and administrators generally. The "return" is not made to the court; there is no hearing upon it; and no order of the court is required as to it. No heir is bound by it; nor does it conclusively establish any fact stated in

it as against an heir: *Estate of Hedrick*, 127 Cal. 184, 188; 59 Pac. Rep. 590.

(7) **Personal liability on contracts.** Neither a state, county, town, nor city is liable on contracts made by the public administrator; and, although he is a public officer, he is personally liable upon contracts made in relation to estates upon which he administers, unless the idea of such personal liability be excluded by the contract: *Dwinelle v. Henriquez*, 1 Cal. 387, 392.

5. **Compensation.** In California, the provision of the County Government Act fixes the salary of the public administrator of a particular county, and, being a special act, it controls the general provision of the code; and the salary of such officer, in such county, is in full compensation for all services rendered by him. Where the statute requires him to pay all commissions allowed by the superior court into the county treasury, he cannot, after the expiration of his term of office, retain fees allowed him for services. He must pay all commissions thereafter received into the county treasury. If he continues to administer upon the estate in his hands, after his term expires, he cannot complain because his services are regarded as voluntary, and because he is denied special compensation therefor. If he knows that he is to have a successor, he may protect himself by asking the court, by an appropriate petition, to revoke his letters, and by resigning his appointment in estates remaining unadministered. He should state his accounts to the close of his term, and ask to be relieved of further performance of the trust. It would then be the duty of the court to settle his accounts, accept his resignation, revoke his letters, and direct his successor to take charge of the estate: *Los Angeles County v. Kellogg*, 146 Cal. 590, 596; 80 Pac. Rep. 861. In California, public administrators, under express provision of the statute, shall receive the same compensation and allowances as are allowed to other administrators: See *Kerr's Cyc. Code Civ. Proc.*, § 1618. A public administrator does not, by virtue of his office, or by filing a petition for letters of administration upon the estate of a decedent, acquire an interest in the estate, or in the commissions to be earned by administering upon it: *Estate of McLaughlin*, 103 Cal. 429; 37 Pac. Rep. 410; *State v. Woody*, 20 Mont. 413; 51 Pac. Rep. 975. He is not, therefore, entitled to fees earned by his successor: *State v. Woody*, 20 Mont. 413; 51 Pac. Rep. 975, 976. In Idaho, the county treasurer is ex officio public administrator, and all fees and compensation received by him in his official capacity, and as public administrator, must be accounted for and reported to his county, and cannot be retained by him for his personal or individual use: *Appeal of Rice*, 12 Ida. 305; 85 Pac. Rep. 1109. The general provision of the code that "such administrators shall

receive the same compensation and allowances as are allowed in this title to other administrators" is controlled by a special act which makes the public administrator a salaried officer, and which fixes his compensation by a salary, and directs him to keep a book recording therein "all fees or compensation of whatever nature, kind, or description," and which also provides that he must pay monthly into the county treasury the fees allowed him in all cases, and which declares that his salary shall be in full compensation for all services: *County of Los Angeles v. Kellogg*, 146 Cal. 590, 596; 80 Pac. Rep. 861.

6. **Appeal.** If the application of a public administrator for letters of administration upon the estate of a deceased person is denied, and he moves for a new trial, and takes an appeal from an order denying his motion, and, pending such appeal, he resigns from the office, and another is appointed in his place, such other person cannot be substituted, because the appeal abated with the resignation of the officer: *Estate of Lermond*, 142 Cal. 585; 76 Pac. Rep. 488.

PART XV.

WILLS.

CHAPTER I.

EXECUTION AND REVOCATION OF WILLS.

- § 860. Who may make a will.
- § 861. Will, or part thereof, procured by fraud.
- § 862. Will by married woman.
- § 863. What may pass by will.
- § 864. Who may take by will.
- § 865. Written will, how to be executed.
- § 866. Form. Will.
- § 867. Definition of a holographic will.
- § 868. Witness to add residence.
- § 869. Mutual will.
- § 870. Competency of subscribing witness.
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- § 872. Gifts to subscribing witnesses are void. Creditor is a competent witness.
- § 873. Witness, who is a devisee, is entitled to share to amount of devise when.
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- § 875. Republication by codicil.
- § 876. Nuncupative will, how to be executed.
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- § 878. Nuncupative will, receiving proof of.
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- § 880. Written will, how revoked.
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- § 882. Revocation of duplicate.
- § 883. Revocation by subsequent will.
- § 884. Antecedent, not revived by revocation of subsequent will.
- § 885. Revocation by marriage and birth of issue.
- § 886. Effect of marriage of a man on his will.
- § 887. Effect of marriage of a woman on her will.
- § 888. Contract of sale not a revocation.
- § 889. Mortgage not a revocation of will.

- § 890. Conveyance, when not a revocation.
- § 891. Conveyance, when a revocation.
- § 892. Revocation of codicils.
- § 893. After-born child, unprovided for, to succeed.
- § 894. Children, or issue of children, unprovided for, to succeed.
- § 895. Share of after-born child to be taken from what estate. Apportionment.
- § 896. Advancement during lifetime of testator.
- § 897. On death of legatee, before testator, lineal descendants take estate.
- § 898. Devises of land, how construed.
- § 899. Wills pass estate subsequently acquired.
- § 900. Charitable, etc., bequests. Limitation as to time and amount.

EXECUTION OF WILLS. REVOCATION. CLASSES.

I. Execution of Wills. Classes.

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| <ul style="list-style-type: none"> 1. Right of testamentary disposition. 2. Limitation of the right. <ul style="list-style-type: none"> (1) In general. (2) Special limitations by statute. (3) Limitation upon right as to certain persons. (4) Right of wife to support as limiting testator's control. 3. Testamentary capacity. <ul style="list-style-type: none"> (1) In general. (2) As affected by age and physical infirmity. (3) As affected by fraud, undue influence, etc. 4. Formalities and execution. <ul style="list-style-type: none"> (1) In general. (2) Signature of testator. (3) Publication by testator. (4) Subscribing witnesses. (5) Attestation by witnesses. 5. Instruments informally executed, invalid as wills. | <ul style="list-style-type: none"> 6. Codicils to wills. <ul style="list-style-type: none"> (1) In general. (2) Reference to the will. 7. Incorporating other papers by reference. 8. Wills in form of deeds. <ul style="list-style-type: none"> (1) In general. (2) Particular examples. 9. Contract to make a will. 10. Escrow deed, when not a will. 11. Deed construed in aid of will. 12. Holographic wills. <ul style="list-style-type: none"> (1) In general. (2) Formalities in executing. (3) Holographic will by married woman. 13. Nuncupative wills. 14. Mutual or reciprocal wills. 15. Foreign wills. 16. Non-intervention wills. 17. Instruments construed not to be wills. 18. Will as evidence. |
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II. Revocation of Wills.

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| <ul style="list-style-type: none"> 1. Revocation in general. 2. Facts and evidence relating to. 3. Revocation of trust devise. | <ul style="list-style-type: none"> 4. Revocation by subsequent will. 5. Revocation by marriage, etc. |
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§ 860. **Who may make a will.** Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in title seven of this part, being chargeable in both cases with the payment

of all the decedent's debts, as provided in the Code of Civil Procedure. **Kerr's Cyc. Civ. Code, § 1270.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 137, p. 380.
Arizona. Rev. Stats. 1901, pars. 4212, 4213, 4229, 4232.
Colorado. 3 Mills's Ann. Stats., secs. 4663, 4730.
Idaho.* Civ. Code 1901, sec. 2503.
Kansas. Gen. Stats. 1905, § 8669.
Montana.* Civ. Code, sec. 1720.
Nevada. Comp. Laws, sec. 3071.
New Mexico. Comp. Laws 1897, sec. 1947.
North Dakota.* Rev. Codes 1905, § 5084.
Oklahoma.* Rev. Stats. 1903, sec. 6799.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5545, 5546.
South Dakota.* Civ. Code 1904, § 998.
Utah. Rev. Stats. 1898, sec. 2731.
Washington. Pierce's Code, § 2340.
Wyoming. Rev. Stats. 1899, sec. 4565.

§ 861. **Will, or part thereof, procured by fraud.** A will, or part of a will, procured to be made by duress, menace, fraud, or undue influence, may be denied probate; and a revocation, procured by the same means, may be declared void. **Kerr's Cyc. Civ. Code, § 1272.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1721.
North Dakota.* Rev. Codes 1905, § 5086.
Oklahoma.* Rev. Stats. 1903, sec. 6801.
South Dakota.* Civ. Code 1904, § 1000.
Utah.* Rev. Stats. 1898, sec. 2732.

§ 862. **Will by married woman.** A married woman may dispose of all her separate estate by will, without the consent of her husband, and may alter or revoke the will in like manner as if she were single. Her will must be executed and proved in like manner as other wills. **Kerr's Cyc. Civ. Code, § 1273.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho.** Civ. Code 1901, sec. 2504.
Nevada. Comp. Laws, sec. 3072.

North Dakota. Rev. Codes 1905, § 5085.

Oklahoma.* Rev. Stats. 1903, sec. 6800.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5547.

South Dakota.* Civ. Code 1904, § 999.

Utah.* Rev. Stats. 1898, sec. 2733.

§ 863. **What may pass by will.** Every estate and interest in real or personal property, to which heirs, husband, widow, or next of kin might succeed, may be disposed of by will, except as otherwise provided in sections fourteen hundred and one and fourteen hundred and two. **Kerr's Cyc. Civ. Code**, § 1274.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

North Dakota. Rev. Codes 1905, § 5087.

Oklahoma. Rev. Stats. 1903, sec. 6802.

South Dakota. Civ. Code 1904, § 1001.

§ 864. **Who may take by will.** A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that corporations other than counties, municipal corporations, and corporations formed for scientific, literary, or solely educational or hospital purposes, cannot take under a will, unless expressly authorized by statute; subject, however, to the provisions of section thirteen hundred and thirteen. **Kerr's Cyc. Civ. Code**, § 1275.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Montana. Civ. Code, sec. 1722.

North Dakota. Rev. Codes 1905, § 5088.

Oklahoma. Rev. Stats. 1903, sec. 6803.

South Dakota. Civ. Code 1904, § 1002.

Utah. Rev. Stats. 1898, sec. 2734.

§ 865. **Written will, how to be executed.** Every will, other than a nuncupative will, must be in writing; and every will, other than an olographic [holographic] will, and a nuncupative will, must be executed and attested as follows:

1. It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction must subscribe his name thereto;

2. The subscription must be made in the presence of the attesting witnesses, or be acknowledged by the testator to them to have been made by him or by his authority;

3. The testator must, at the time of subscribing or acknowledging the same, declare to the attesting witnesses that the instrument is his will; and,

4. There must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence. **Kerr's Cyc. Civ. Code**, § 1276.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 138, p. 380; sec. 166, p. 384.

Arizona. Rev. Stats. 1901, par. 4214.

Colorado. 3 Mills's Ann. Stats., sec. 4664.

Idaho.* Civ. Code 1901, sec. 2505.

Kansas. Gen. Stats. 1905, § 8670.

Montana. Civ. Code, sec. 1723.

Nevada. Comp. Laws, sec. 3073.

New Mexico. Comp. Laws 1897, secs. 1949, 1952.

North Dakota.* Rev. Codes 1905, § 5093.

Oklahoma. Rev. Stats. 1903, sec. 6807.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5548.

South Dakota. Civ. Code 1904, § 1006.

Utah. Rev. Stats. 1898, sec. 2735.

Washington. Pierce's Code, §§ 2341, 2342.

Wyoming. Rev. Stats. 1899, sec. 4568.

§ 866. Form. Will.

I ———, of the county ¹ of ———, state of ———, being of sound mind and memory, do hereby make, publish, and declare this, my last will, in manner and form as follows, that is to say:

First. I direct the payment of all my just debts and funeral expenses.²

Second. I give, devise, and bequeath all the property, real and personal, of whatsoever kind the same may be, or wheresoever situated, of which I may die possessed, or to which I may be entitled, to ———,³ to have and to hold the same to the said ———, ———⁴ assigns forever.

Third. I nominate and appoint ——— executrix⁵ of this my last will and testament, and I hereby revoke any and all former wills by me made.

In witness whereof, I have hereunto set my hand and seal this ——— day of ———, one thousand nine hundred and ———, 19——. ———, [Seal]

The foregoing instrument consisting of ——— () pages, besides this,⁶ was, at the date hereof, by the said ———, signed, sealed, and published as, and declared to be, his last will and testament, in presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

———, residing at ———.

———, residing at ———.

Explanatory notes. 1. Or, city and county. 2. And other directions, if any. 3. Name the devisee, "my beloved wife," or other person. 4. Her or his. 5. Or, executor. 6. As a precautionary measure, the testator's name should be subscribed to each page of the will, to prevent alterations, that might easily be made in type-written wills. For a crude paper held to be a valid will: See 68 Am. St. Rep. 874, 875.

§ 867. Definition of a holographic will. A holographic will is one that is entirely written, dated, and signed by the hand of the testator himself. It is subject to no other form, and may be made in or out of this state, and need not be witnessed. **Kerr's Cyc. Civ. Code, § 1277.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 4215.

Idaho.* Civ. Code 1901, sec. 2506.

Montana.* Civ. Code, sec. 1724.

Nevada. Comp. Laws, secs. 3092, 3093.

North Dakota.* Rev. Codes 1905, § 5092.

Oklahoma. Rev. Stats. 1903, sec. 6807.

South Dakota. Civ. Code 1904, § 1006.

Utah. Rev. Stats. 1898, sec. 2736.

§ 868. Witness to add residence. A witness to a written will must write, with his name, his place of residence; and a person who subscribes the testator's name, by his direction,

must write his own name as a witness to the will. But a violation of this section does not affect the validity of the will. **Kerr's Cyc. Civ. Code, § 1278.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Civ. Code 1901, sec. 2507.

Montana.* Civ. Code, sec. 1725.

North Dakota.* Rev. Codes 1905, § 5095.

Oklahoma.* Rev. Stats. 1903, sec. 6809.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5549.

South Dakota.* Civ. Code 1904, § 1008.

Utah. Rev. Stats. 1898, sec. 2737.

§ 869. **Mutual will.** A conjoint or mutual will is valid, but it may be revoked by any of the testators, in like manner with any other will. **Kerr's Cyc. Civ. Code, § 1279.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1726.

North Dakota.* Rev. Codes 1905, § 5090.

Oklahoma.* Rev. Stats. 1903, sec. 6805.

South Dakota.* Civ. Code 1904, § 1004.

Utah.* Rev. Stats. 1898, sec. 2738.

§ 870. **Competency of subscribing witness.** If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and allowance of the will, if it is otherwise satisfactorily proved. **Kerr's Cyc. Civ. Code, § 1280.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Civ. Code 1901, sec. 2508.

Montana.* Civ. Code, sec. 1727.

North Dakota.* Rev. Codes 1905, § 5126.

Oklahoma.* Rev. Stats. 1903, sec. 6835.

South Dakota.* Civ. Code 1904, § 1034.

Utah.* Rev. Stats. 1898, sec. 2739.

Wyoming. Rev. Stats. 1899, sec. 4568.

§ 871. **Conditional will.** A will, the validity of which is made by its own terms conditional, may be denied probate,

according to the event, with reference to the condition.
Kerr's Cyc. Civ. Code, § 1281.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1728.
- North Dakota.*** Rev. Codes 1905, § 5091.
- Oklahoma.*** Rev. Stats. 1903, sec. 6806.
- South Dakota.*** Civ. Code 1904, § 1005.
- Utah.*** Rev. Stats. 1898, sec. 2741.

§ 872. Gifts to subscribing witnesses are void. Creditor is a competent witness. All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing witness thereto, are void, unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts does not prevent his creditors from being competent witnesses to his will. **Kerr's Cyc. Civ. Code, § 1282.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 153, p. 382; secs. 155, 156, p. 383.
- Arizona.** Rev. Stats. 1901, par. 4227.
- Colorado.** 3 Mills's Ann. Stats., secs. 4667, 4668.
- Kansas.** Gen. Stats. 1905, § 8679.
- Montana.*** Civ. Code, sec. 1729.
- Nevada.*** Comp. Laws, sec. 3074.
- New Mexico.** Comp. Laws 1897, sec. 1951.
- North Dakota.*** Rev. Codes 1905, § 5124.
- Oklahoma.*** Rev. Stats. 1903, sec. 6833.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., §§ 5564, 5566, 5567.
- South Dakota.*** Civ. Code 1904, § 1032.
- Utah.*** Rev. Stats. 1898, sec. 2742.
- Washington.** Pierce's Code, § 2353.
- Wyoming.** Rev. Stats. 1899, sec. 4568.

§ 873. Witness, who is a devisee, is entitled to share to amount of devise when. If a witness, to whom any beneficial devise, legacy, or gift, void by the preceding section, is made, would have been entitled to any share of the estate of the testator, in case the will should not be established, he succeeds to so much of the share as would be distributed to

him, not exceeding the devise or bequest made to him in the will, and he may recover the same of the other devisees or legatees named in the will, in proportion to and out of the parts devised or bequeathed to them. **Kerr's Cyc. Civ. Code**, § 1283.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 154, p. 383.
Arizona. Rev. Stats. 1901, par. 4227.
Colorado. 3 Mills's Ann. Stats., sec. 4667.
Kansas. Gen. Stats. 1905, § 8679.
Montana.* Civ. Code, sec. 1730.
North Dakota.* Rev. Codes 1905, § 5125.
Oklahoma.* Rev. Stats. 1903, sec. 6834.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5565.
South Dakota.* Civ. Code 1904, § 1033.
Utah.* Rev. Stats. 1898, sec. 2743.
Washington. Pierce's Code, § 2353.
Wyoming. Rev. Stats. 1899, sec. 4568.

§ 874. **Will made out of state, validity of.** No will made out of this state is valid as a will in this state, unless executed according to the provisions of this chapter, except that a will made in a state or country in which the testator is domiciled at the time of his death, and valid as a will under the laws of such state or country, is valid in this state so far as the same relates to personal property, subject, however, to the provisions of section thirteen hundred and thirteen. **Kerr's Cyc. Civ. Code**, § 1285.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 150, p. 382.
Idaho. Civ. Code 1901, sec. 2536.
Montana. Civ. Code, secs. 1731, 1838.
New Mexico. Comp. Laws 1897, sec. 1976.
North Dakota. Rev. Codes 1905, §§ 5097, 5098, 5099.
Oklahoma. Rev. Stats. 1903, secs. 6811, 6812, 6891.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5561.
South Dakota. Civ. Code 1904, §§ 1010, 1011, 1012, 1090.
Utah. Rev. Stats. 1898, sec. 2744.

§ 875. **Republication by codicil.** The execution of a codicil, referring to a previous will, has the effect to republish the will, as modified by the codicil. **Kerr's Cyc. Civ. Code, § 1287.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1733.
North Dakota.* Rev. Codes 1905, § 5096.
Oklahoma.* Rev. Stats. 1903, sec. 6810.
South Dakota.* Civ. Code 1904, § 1009.
Utah.* Rev. Stats. 1898, sec. 2745.

§ 876. **Nuncupative will, how to be executed.** A nuncupative will is not required to be in writing, nor to be declared or attested with any formalities. **Kerr's Cyc. Civ. Code, § 1288.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 147, p. 382.
Arizona. Rev. Stats. 1901, par. 4217.
Kansas. Gen. Stats. 1905, § 8739.
Montana. Civ. Code Proc., sec. 1734.
New Mexico. Comp. Laws 1897, sec. 1948.
North Dakota.* Rev. Codes 1905, § 5094.
Oklahoma.* Rev. Stats. 1903, sec. 6808.
South Dakota.* Civ. Code 1904, § 1007.
Utah.* Rev. Stats. 1898, sec. 2746.

§ 877. **Nuncupative will, requisites of.** To make a nuncupative will valid, and to entitle it to be admitted to probate, the following requisites must be observed:

1. The estate bequeathed must not exceed in value the sum of one thousand dollars.
2. It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator, at the time, to bear witness that such was his will, or to that effect.
3. The decedent must, at the time, have been in actual military service in the field, or doing duty on shipboard at sea, and in either case in actual contemplation, fear, or peril of death, or the decedent must have been, at the time, in

expectation of immediate death from an injury received the same day. **Kerr's Cyc. Civ. Code, § 1289.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 147, p. 382.
Arizona. Rev. Stats. 1901, pars. 4217, 4218, 4221.
Kansas. Gen. Stats. 1905, § 8739.
Montana.* Civ. Code, sec. 1735.
Nevada. Comp. Laws, sec. 3075.
New Mexico. Comp. Laws 1897, sec. 1950.
North Dakota.* Rev. Codes 1905, § 5089.
Oklahoma.* Rev. Stats. 1903, sec. 6804.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5558.
South Dakota.* Civ. Code 1904, § 1003.
Utah. Rev. Stats. 1898, sec. 2747.
Washington. Pierce's Code, § 2351.

§ 878. Nuncupative will, receiving proof of. No proof must be received of any nuncupative will, unless it is offered within six months after speaking the testamentary words, nor unless the words, or the substance thereof, were reduced to writing within thirty days after they were spoken. **Kerr's Cyc. Civ. Code, § 1290.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.*** Carter's Code, sec. 148, p. 382.
Arizona. Rev. Stats. 1901, par. 4220.
Kansas. Gen. Stats. 1905, §§ 8739, 8740.
Montana.* Civ. Code, sec. 1736.
Nevada. Comp. Laws, sec. 3076.
Oregon.* Bellinger and Cotton's Ann. Codes and Stats., § 5559.
Utah.* Rev. Stats. 1898, sec. 2748.
Washington. Pierce's Code, § 2352.

§ 879. Nuncupative will, granting probate of. No probate of any nuncupative will must be granted for fourteen days after the death of the testator, nor must any nuncupative will be at any time proved, unless the testamentary words, or the substance thereof, be first committed to writing, and process issued to call in the widow, or other persons interested, to contest the probate of such will, if they think proper. **Kerr's Cyc. Civ. Code, § 1291.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 149, p. 382.
Arizona. Rev. Stats. 1901, par. 4219.
Montana.* Civ. Code, sec. 1737.
Nevada. Comp. Laws, sec. 3077.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5560.
Washington. Pierce's Code, § 2352.

§ 880. **Written will, how revoked.** Except in the cases in this chapter mentioned, no written will, nor any part thereof, can be revoked or altered otherwise than:

1. By a written will, or other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which a will should be executed by such testator; or,

2. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction. **Kerr's Cyc. Civ. Code**, § 1292.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 167, p. 384.
Arizona. Rev. Stats. 1901, par. 4216.
Colorado. 3 Mills's Ann. Stats., sec. 4665.
Idaho.* Civ. Code 1901, sec. 2509.
Kansas. Gen. Stats. 1905, § 8707.
Montana.* Civ. Code, sec. 1738.
Nevada. Comp. Laws, sec. 3078.
New Mexico. Comp. Laws 1897, sec. 1953.
North Dakota.* Rev. Codes 1905, § 5107.
Oklahoma.* Rev. Stats. 1903, sec. 6818.
South Dakota.* Civ. Code 1904, § 1017.
Utah.* Rev. Stats. 1898, sec. 2749.
Washington. Pierce's Code, § 2343.
Wyoming. Rev. Stats. 1899, sec. 4569.

§ 881. **Evidence of revocation.** When a will is canceled or destroyed by any other person than the testator, the direction of the testator, and the fact of such injury or destruction, must be proved by two witnesses. **Kerr's Cyc. Civ. Code**, § 1293.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 167, p. 384.
Idaho.* Civ. Code 1901, sec. 2510.
Kansas. Gen. Stats. 1905, § 8707.
Montana.* Civ. Code, sec. 1739.
North Dakota.* Rev. Codes 1905, § 5105.
Oklahoma.* Rev. Stats. 1903, sec. 6819.
South Dakota.* Civ. Code 1904, § 1018.
Utah.* Rev. Stats. 1898, sec. 2750.

§ 882. **Revocation of duplicate.** The revocation of a will, executed in duplicate, may be made by revoking one of the duplicates. **Kerr's Cyc. Civ. Code, § 1295.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho.*** Civ. Code 1901, sec. 2511.
Montana.* Civ. Code, sec. 1740.
North Dakota.* Rev. Codes 1905, § 5107.
Oklahoma.* Rev. Stats. 1903, sec. 6821.
South Dakota.* Civ. Code 1904, § 1020.
Utah.* Rev. Stats. 1898, sec. 2751.

§ 883. **Revocation by subsequent will.** A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will. **Kerr's Cyc. Civ. Code, § 1296.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Kansas.** Gen. Stats. 1905, §§ 8707, 8708.
Montana.* Civ. Code, sec. 1741.
New Mexico. Comp. Laws 1897, sec. 1953.
North Dakota.* Rev. Codes 1905, § 5108.
Oklahoma.* Rev. Stats. 1903, sec. 6822.
South Dakota.* Civ. Code 1904, § 1021.
Utah.* Rev. Stats. 1898, sec. 2752.

§ 884. **Antecedent, not revived by revocation of subsequent will.** If, after making a will, the testator duly makes and executes a second will, the destruction, cancelation, or revo-

cation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancelation, or revocation, the first will is duly republished. **Kerr's Cyc. Civ. Code, § 1297.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 146, p. 381.
- Idaho.*** Civ. Code 1901, sec. 2512.
- Montana.*** Civ. Code, sec. 1742.
- Nevada.** Comp. Laws, sec. 3079.
- New Mexico.** Comp. Laws 1897, sec. 1954.
- North Dakota.*** Rev. Codes 1905, § 5109.
- Oklahoma.** Rev. Stats. 1903, sec. 6823.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5557.
- South Dakota.*** Civ. Code 1904, § 1022.
- Utah.*** Rev. Stats. 1898, sec. 2753.
- Washington.** Pierce's Code, § 2350.

§ 885. **Revocation by marriage and birth of issue.** If, after having made a will, the testator marries, and has issue of such marriage, born either in his lifetime or after his death, and the wife or issue survives him, the will is revoked, unless provision has been made for such issue by some settlement, or unless such issue are provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of such revocation can be received. **Kerr's Cyc. Civ. Code, § 1298.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 139, p. 380; sec. 140, p. 381.
- Idaho.*** Civ. Code 1901, sec. 2513.
- Montana.*** Civ. Code, sec. 1743.
- North Dakota.*** Rev. Codes 1905, § 5110.
- Oklahoma.** Rev. Stats. 1903, sec. 6824.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5550.
- South Dakota.*** Civ. Code 1904, § 1023.

§ 886. **Effect of marriage of a man on his will.** If, after making a will, the testator marries, and the wife survives the

testator, the will is revoked, unless provision has been made for her by marriage contract, or unless she is provided for in the will, or in such way mentioned therein as to show an intention not to make such provision; and no other evidence to rebut the presumption of revocation must be received. **Kerr's Cyc. Civ. Code, § 1299.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 139, p. 380; sec. 140, p. 381.
- Arizona.** Rev. Stats. 1901, par. 4216.
- Idaho.*** Civ. Code 1901, sec. 2514.
- Montana.*** Civ. Code, sec. 1744.
- Nevada.** Comp. Laws, sec. 3080.
- North Dakota.*** Rev. Codes 1905, § 5111.
- Oklahoma.** Rev. Stats. 1903, sec. 6824.
- Utah.** Rev. Stats. 1898, sec. 2754.
- Washington.*** Pierce's Code, § 2344.

§ 887. Effect of marriage of a woman on her will. A will, executed by a woman, is revoked by her subsequent marriage, and is not revived by the death of her husband. **Kerr's Cyc. Civ. Code, § 1300.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 140, p. 381.
- Idaho.** Civ. Code 1901, sec. 2515.
- Montana.** Civ. Code, sec. 1745.
- Nevada.** Comp. Laws, sec. 3081.
- North Dakota.** Rev. Codes 1905, § 5112.
- Oklahoma.** Rev. Stats. 1903, sec. 6825.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5551.
- South Dakota.** Civ. Code 1904, § 1024.

§ 888. Contract of sale not a revocation. An agreement made by a testator, for the sale or transfer of property disposed of by a will previously made, does not revoke such disposal; but the property passes by the will, subject to the same remedies on the testator's agreement, for a specific performance or otherwise against the devisees or legatees, as might be had against the testator's successors, if the same had passed by succession. **Kerr's Cyc. Civ. Code, § 1301.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 141, p. 381.
Idaho.* Civ. Code 1901, sec. 2516.
Kansas. Gen. Stats. 1905, § 8700.
Montana.* Civ. Code, sec. 1746.
Nevada. Comp. Laws, sec. 3082.
North Dakota.* Rev. Codes 1905, § 5113.
Oklahoma.* Rev. Stats. 1903, sec. 6826.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5552.
South Dakota.* Civ. Code 1904, § 1025.
Utah.* Rev. Stats. 1898, sec. 2755.
Washington. Pierce's Code, § 2345.

§ 889. **Mortgage not a revocation of will.** A charge or encumbrance upon any estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not a revocation of any will relating to the same estate which was previously executed; but the devise and legacies therein contained must pass, subject to such charge or encumbrance. **Kerr's Cyc. Civ. Code, § 1302.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.*** Carter's Code, sec. 142, p. 381.
Idaho.* Civ. Code 1901, sec. 2517.
Kansas. Gen. Stats. 1905, § 8701.
Montana.* Civ. Code, sec. 1747.
Nevada.* Comp. Laws, sec. 3083.
North Dakota.* Rev. Codes 1905, § 5114.
Oklahoma.* Rev. Stats. 1903, sec. 6827.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5553.
South Dakota.* Civ. Code 1904, § 1026.
Utah.* Rev. Stats. 1898, sec. 2756.
Washington.* Pierce's Code, § 2346.

§ 890. **Conveyance, when not a revocation.** A conveyance, settlement, or other act of a testator, by which his interest in a thing previously disposed of by his will is altered, but not wholly divested, is not a revocation; but the will passes the property which would otherwise devolve by succession. **Kerr's Cyc. Civ. Code, § 1303.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 161, p. 383.

Idaho.* Civ. Code 1901, sec. 2518.

Kansas. Gen. Stats. 1905, § 8702.

Montana.* Civ. Code, sec. 1748.

North Dakota.* Rev. Codes 1905, § 5115.

Oklahoma.* Rev. Stats. 1903, sec. 6828.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5573.

South Dakota.* Civ. Code 1904, § 1027.

Utah.* Rev. Stats. 1898, sec. 2757.

§ 891. **Conveyance, when a revocation.** If the instrument by which an alteration is made in the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect. **Kerr's Cyc. Civ. Code, § 1304.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Civ. Code 1901, sec. 2519.

Kansas. Gen. Stats. 1905, § 8703.

Montana.* Civ. Code, sec. 1749.

North Dakota.* Rev. Codes 1905, § 5116.

Oklahoma.* Rev. Stats. 1903, sec. 6829.

South Dakota.* Civ. Code 1904, § 1028.

Utah.* Rev. Stats. 1898, sec. 2758.

§ 892. **Revocation of codicils.** The revocation of a will revokes all its codicils. **Kerr's Cyc. Civ. Code, § 1305.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Civ. Code 1901, sec. 2520.

Montana.* Civ. Code, sec. 1750.

North Dakota.* Rev. Codes 1905, § 5117.

Oklahoma.* Rev. Stats. 1903, sec. 6830.

South Dakota.* Civ. Code 1904, § 1029.

Utah.* Rev. Stats. 1898, sec. 2759.

§ 893. After-born child, unprovided for, to succeed. Whenever a testator has a child born after the making of his will, either in his lifetime or after his death, and dies leaving such child unprovided for by any settlement, and neither provided for nor in any way mentioned in his will, the child succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate. But such succession does not impair or affect the validity of any sale of property made by authority of such will in accordance with the provisions of section fifteen hundred and sixty-one of the Code of Civil Procedure. **Kerr's Cyc. Civ. Code, § 1306.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 143, p. 381.
Arizona. Rev. Stats. 1901, pars. 4222, 4223, 4224.
Colorado. 3 Mills's Ann. Stats., sec. 4666.
Idaho. Civ. Code 1901, sec. 2521.
Kansas. Gen. Stats. 1905, §§ 8706, 8709.
Montana. Civ. Code, sec. 1751.
Nevada. Comp. Laws, sec. 3084.
New Mexico. Comp. Laws 1897, sec. 2037.
North Dakota. Rev. Codes 1905, § 5118.
Oklahoma. Rev. Stats. 1903, sec. 6831.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5554.
South Dakota. Civ. Code 1904, § 1030.
Utah. Rev. Stats. 1898, sec. 2760.
Washington. Pierce's Code, § 2347.

§ 894. Children, or issue of children, unprovided for, to succeed. When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section. But such succession does not impair or affect the validity of any sale of property made by authority of such will in accordance with the provisions of section fifteen hundred and sixty-one

of the Code of Civil Procedure. **Kerr's Cyc. Civ. Code**, § 1307.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 143, p. 381.

Idaho. Civ. Code 1901, sec. 2522.

Kansas. Gen. Stats. 1905, §§ 8706, 8709.

Montana. Civ. Code, sec. 1752.

Nevada. Comp. Laws, sec. 3085.

New Mexico. Laws 1901, sec. 39, p. 157.

North Dakota. Rev. Codes 1905, § 5119.

Oklahoma. Rev. Stats. 1903, sec. 6831.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5554.

South Dakota. Civ. Code 1904, § 1030.

Utah. Rev. Stats. 1898, sec. 2761.

Washington. Pierce's Code, § 2347.

§ 895. **Share of after-born child to be taken from what estate. Apportionment.** When any share of the estate of a testator is assigned to a child born after the making of a will, or to a child, or the issue of a child, omitted in the will, as hereinbefore mentioned, the same must first be taken from the estate not disposed of by the will, if any; if that is not sufficient, so much as may be necessary must be taken from all the devisees or legatees, in proportion to the value they may respectively receive under the will, unless the obvious intention of the testator in relation to some specific devise or bequest, or other provision in the will, would thereby be defeated; in such case, such specific devise, legacy, or provision, may be exempted from such apportionment, and a different apportionment, consistent with the intention of the testator, may be adopted. **Kerr's Cyc. Civ. Code**, § 1308.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 143, p. 381.

Arizona. Rev. Stats. 1901, pars. 4222, 4223, 4224.

Idaho.* Civ. Code 1901, sec. 2523.

Kansas. Gen. Stats. 1905, § 8709.

Montana. Civ. Code, sec. 1753.

Nevada.* Comp. Laws, sec. 3086.

New Mexico. Comp. Laws 1897, sec. 2037; and Laws 1901, sec. 39, p. 157.

North Dakota.* Rev. Codes 1905, § 5120.
Oklahoma. Rev. Stats. 1903, sec. 6831.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5554.
South Dakota. Civ. Code 1904, § 1030.
Utah.* Rev. Stats. 1898, sec. 2762.
Washington. Pierce's Code, § 2347.

§ 896. **Advancement during lifetime of testator.** If such children, or their descendants, so unprovided for, had an equal proportion of the testator's estate bestowed on them in the testator's lifetime, by way of advancement, they take nothing in virtue of the provisions of the three preceding sections. **Kerr's Cyc. Civ. Code, § 1309.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska.* Carter's Code, sec. 144, p. 381.
Idaho.* Civ. Code 1901, sec. 2524.
Kansas. Gen. Stats. 1905, § 8710.
Montana. Civ. Code, sec. 1754.
Nevada. Comp. Laws, sec. 3087.
North Dakota. Rev. Codes 1905, § 5121.
Oklahoma. Rev. Stats. 1903, sec. 6831.
Oregon.* Bellinger and Cotton's Ann. Codes and Stats., § 5555.
South Dakota. Civ. Code 1904, § 1030.
Utah. Rev. Stats. 1898, sec. 2763.
Washington. Pierce's Code, § 2348.

§ 897. **On death of legatee, before testator, lineal descendants take estate.** When any estate is devised or bequeathed to any child, or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, such descendants take the estate so given by the will, in the same manner as the devisee or legatee would have done had he survived the testator. **Kerr's Cyc. Civ. Code, § 1310.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 145, p. 381.
Arizona. Rev. Stats. 1901, par. 4226.
Colorado. 3 Mills's Ann. Stats., sec. 4670.
Idaho. Civ. Code 1901, sec. 2525.

Kansas. Gen. Stats. 1905, § 8725.

Montana. Civ. Code, sec. 1755.

Nevada. Comp. Laws, sec. 3088.

North Dakota.* Rev. Codes 1905, § 5123.

Oklahoma. Rev. Stats. 1903, sec. 6832.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5556.

South Dakota. Civ. Code 1904, § 1031.

Utah.* Rev. Stats. 1898, sec. 2764.

Washington.* Pierce's Code, § 2349.

§ 898. **Devises of land, how construed.** Every devise of land in any will conveys all the estate of the devisor therein, which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate. **Kerr's Cyc. Civ. Code, § 1311.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 161, p. 383.

Idaho.* Civ. Code 1901, sec. 2526.

Kansas.* Gen. Stats. 1905, § 8724.

Montana.* Civ. Code, sec. 1756.

Nevada.* Comp. Laws, sec. 3089.

North Dakota.* Rev. Codes 1905, § 5122.

Oklahoma. Rev. Stats. 1903, sec. 6831.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5573.

South Dakota. Civ. Code 1904, § 1030.

Utah.* Rev. Stats. 1898, sec. 2765.

Washington.* Pierce's Code, § 2354.

Wyoming. Rev. Stats. 1899, sec. 4566.

§ 899. **Wills pass estate subsequently acquired.** Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto was vested in him at the time of making the will, unless the contrary manifestly appears by the will to have been the intention of the testator. Every will made in express terms, devising, or in any other terms denoting the intent of the testator to devise all the real estate of such testator, passes all the real estate which such testator was entitled to devise at the time of his decease. **Kerr's Cyc. Civ. Code, § 1312.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 161, p. 383.
Idaho.* Civ. Code 1901, sec. 2527.
Kansas. Gen. Stats. 1905, § 8723.
Montana.* Civ. Code, sec. 1757.
Nevada. Comp. Laws, sec. 3090.
North Dakota.* Rev. Codes 1905, § 5128.
Oklahoma.* Rev. Stats. 1903, sec. 6836.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5573.
South Dakota.* Civ. Code 1904, § 1035.
Utah.* Rev. Stats. 1898, sec. 2766.
Washington. Pierce's Code, § 2356.
Wyoming. Rev. Stats. 1899, sec. 4567.

§ 900. Charitable, etc., bequests. Limitation as to time and amount. No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made, at least thirty days prior to such death such devise or legacy and each of them shall be valid; provided, that no such devises or bequests shall collectively exceed one third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law. **Kerr's Cyc. Civ. Code, § 1313.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho.** Civ. Code 1901, sec. 2528.
Montana.* Civ. Code, sec. 1758.
New Mexico. Comp. Laws 1897, sec. 1992.

EXECUTION OF WILLS. REVOCATION. CLASSES.**I. Execution of Wills. Classes.**

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| 1. Right of testamentary disposition. | 6. Codicils to wills. |
| 2. Limitation of the right. | (1) In general. |
| (1) In general. | (2) Reference to the will. |
| (2) Special limitations by statute. | 7. Incorporating other papers by reference. |
| (3) Limitation upon right as to certain persons. | 8. Wills in form of deeds. |
| (4) Right of wife to support as limiting testator's control. | (1) In general. |
| 3. Testamentary capacity. | (2) Particular examples. |
| (1) In general. | 9. Contract to make a will. |
| (2) As affected by age and physical infirmity. | 10. Escrow deed, when not a will. |
| (3) As affected by fraud, undue influence, etc. | 11. Deed construed in aid of will. |
| 4. Formalities and execution. | 12. Holographic wills. |
| (1) In general. | (1) In general. |
| (2) Signature of testator. | (2) Formalities in executing. |
| (3) Publication by testator. | (3) Holographic will by married woman. |
| (4) Subscribing witnesses. | 13. Nuncupative wills. |
| (5) Attestation by witnesses. | 14. Mutual or reciprocal wills. |
| 5. Instruments informally executed, invalid as wills. | 15. Foreign wills. |
| | 16. Non-intervention wills. |
| | 17. Instruments construed not to be wills. |
| | 18. Will as evidence. |

II. Revocation of Wills.

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| 1. Revocation in general. | 4. Revocation by subsequent will. |
| 2. Facts and evidence relating to. | 5. Revocation by marriage, etc. |
| 3. Revocation of trust devise. | |

I. EXECUTION OF WILLS. CLASSES.

1. **Right of testamentary disposition.** The right to dispose of one's property by will, and to bestow it upon whomsoever the testator likes, is a most valuable incident to ownership, and does not depend upon the judicious use of that right. The decisions go so far as to say, that while it seems harsh and cruel that a parent should disinherit one of his children and devise his property to others, or cut them off and devise it to strangers from some unworthy motive, yet so long as that motive, whether from pride or aversion, or spite or prejudice, is not resolvable into mental perversion, no court can interfere: In re Holden's Estate, 42 Or. 345; 70 Pac. Rep. 908, 913; and see Estate of Kauffmann, 117 Cal. 288; 49 Pac. Rep. 192; 59 Am. St. Rep. 179; Potter v. Jones, 20 Or. 229; 25 Pac. Rep. 769; 12 L. R. A. 161. In re Shell's Estate, 28 Col. 167; 63 Pac. Rep. 413, 416. Every person possesses absolute dominion over his property and may bestow it upon whom-

soever he pleases, without regard to natural or legal claims upon his bounty, if he possesses testamentary capacity, and exercises his own individual will and judgment in the matter: *In re Turner's Will* (Or.), 93 Pac. Rep. 461, 464; *Potter v. Jones*, 20 Or. 239; 25 Pac. Rep. 769; 12 L. R. A. 116. The right of independent disposition of property by will is absolute, and no presumption can be indulged in against the exercise of this legal right: *Hunt v. Phillips*, 34 Wash. 365; 75 Pac. Rep. 970, 972. A person competent to make a will has a right to select the custodian, and to cause it to remain in his hands until called for, or until death makes it necessary for the custodian to deliver it to the court, or to a person named in the will: *Mastick v. Superior Court*, 94 Cal. 347, 350; 29 Pac. Rep. 869.

REFERENCES.

Is the right to take property by will or inheritance a natural, or a statutory right? See note 9 L. R. A. (N. S.) 121-123. Testamentary disposition of child, right of mother to make: See note 7 Am. & Eng. Ann. Cas. 450. See note § 69, ante, head-line 3, subd. 2. Power to make will generally: See note *Kerr's Cal. Cyc. Civ. Code*, § 1270.

2. Limitation of the right.

(1) *In general.* The privilege of disposing of one's property by will is not a natural right, but depends upon positive law. The right is within the control of the law-making power: *In re Little's Estate*, 22 Utah, 204; 61 Pac. Rep. 899, 900. The right of any person to execute a will, as well as the form in which the will must be executed, or the manner in which it may be revoked, are matters entirely of statutory regulation. The legislature has the power to limit the class of persons who shall be competent to make a will, or to declare that a change in the personal status of such persons after its execution shall operate as a revocation of the will, or be a sufficient reason for denying it probate: *In re Comassi's Estate*, 107 Cal. 1; 40 Pac. Rep. 15, 16; *Estate of Bump*, (Cal.), 92 Pac. Rep. 643. This right to make a testamentary disposition of property is available only upon a compliance with the requirements of the statute. For the purpose of determining whether a will has been properly executed, the intention of the testator in executing it, is entitled to no consideration. For that purpose only the intention of the legislature, as expressed in the language of the statute, can be considered by the court, and whether the will, as presented, shows a compliance with the statute: *Estate of Seaman*, 146 Cal. 455; 80 Pac. Rep. 700, 701; and see *Estate of Walker*, 110 Cal. 387; 42 Pac. Rep. 815; 30 L. R. A. 460; 52 Am. St. Rep. 104.

(2) *Special limitations by statute.* The Kansas statute provides as follows: "No man while married shall bequeath away from his wife more than one half of his property, nor shall any woman, while married,

bequeath away from her husband more than one half of her property. But either may consent, in writing, executed in the presence of two witnesses, that the other may bequeath more than one half of his or her property from the one so consenting." Under this statute, if a husband signs a consent, to the provisions of his wife's will, to permit her to bequeath her property, such consent imports its own consideration, but will not be construed, in the absence of any consideration, as a conveyance of an interest or estate in his own property: *Wilson v. Johnson*, 4 Kan. 747; 46 Pac. Rep. 833, 835. Under the statute of Kansas, which provides that the husband or wife may bequeath away from the other more than one half of his or her property, if the other spouse gives consent in writing, executed in the presence of two witnesses, the form or name of the writing giving consent is not important, if it sufficiently shows that the one consenting agrees to accept any provision made in the will in place of the share which the statute would give, and that it is duly witnessed. Nor is it necessary that the witnesses shall subscribe their names to the writing. It is enough that it is executed in their presence: *Jack v. Hooker*, 71 Kan. 652; 81 Pac. Rep. 203, 205. The provision of the California statute providing that, where a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, is not to be construed as a limitation upon the power of the testator to make provision for a substitution. If the will provides for such contingency, this statute has no application: *Estate of Bennett*, 134 Cal. 320; 66 Pac. Rep. 370, 371. It is not within the power of the husband, by any provision of his will, to deprive his wife of her right to allowance for the support of herself and children during the settlement of the estate, or to limit, in any way, the power of the court, in the exercise of its proper discretion, to fix the amount to be allowed: *Estate of Bump*, 152 Cal. 274; 92 Pac. Rep. 643, 644.

(3) **Limitation upon right as to certain persons.** Where an Indian receives a deed of land from the United States government, with the condition that the same shall not be alienated, such person has no power to pass title to the land by will. The word "alienate" means, among other things, the power of disposition by will: *Jackson v. Thompson*, 38 Wash. 282; 80 Pac. Rep. 454, 456.

(4) **Right of wife to support as limiting testator's control.** The testator cannot so dispose of his property as to relieve it from the burden of supporting his widow and children, whenever the court, having jurisdiction of the administration of the estate, shall make an order to that effect: *Estate of Bump*, 152 Cal. 274; 92 Pac. Rep. 643. Where a husband directs, in his will, the payment to his wife, during her life, of such sums of money as may, in the sound judgment and

discretion of the trustees, be reasonable and sufficient for her maintenance, following such provision with specific bequests which cannot be made out of the estate, if the preceding bequests and trusts be observed, the wife is entitled to preference, under the terms of the will, as against the opposing legatees: *In re Sear's Estate*, 18 Utah, 193; 55 Pac. Rep. 83, 84.

3. Testamentary capacity.

(1) **In general.** It cannot be said that a testator lacks testamentary capacity, where there is nothing to indicate that he was not sane, or in full possession of his faculties, or that he was acting under excitement or undue influence at the time of making his will. Though illiterate, it is sufficient if the testator knew and understood what he was doing, and to whom he was giving his property, when he executed his will, and that the will was read over to him before signing: *Franke v. Shipley*, 22 Or. 104; 29 Pac. Rep. 268. Habits of drunkenness do not of themselves take away a man's capacity to make a will: *Estate of Wilson*, 117 Cal. 262; 49 Pac. Rep. 172, 176. (See cases reviewed in the decision as to the bearing upon testamentary capacity of testimony relating to drunkenness or the drinking habit.) The expression "unsound mind" stands for and includes the want of a disposing mind or testamentary capacity: *Clements v. McGinn* (Cal.), 33 Pac. Rep. 920, 921.

REFERENCES.

Aversion to relatives as affecting mental capacity to make a will: See note 117 Am. St. Rep. 582-585. Morphinism, effect of, on testamentary capacity: See note 39 L. R. A. 262-265. Spiritualism, belief in, as affecting testamentary capacity: See note 36 Am. Rep. 426. Consult notes to the following sections of *Kerr's Cal. Cyc. Civ. Code*, as to the subjects indicated: Unsoundness of mind, § 1270; testamentary capacity, generally, § 1270; intoxication as affecting testamentary capacity, § 1270; unnatural and inequitable wills, § 1270. Testamentary capacity to make a will: See notes 1 L. R. A. 161; 2 L. R. A. 668; 6 L. R. A. 167; 8 Am. Rep. 184; 84 Am. Dec. 240; 41 Am. Rep. 686; 3 L. R. A. (N. S.) 172.

(2) **As affected by age and physical infirmity.** Notwithstanding a testator's old age, sickness, inability of body, or extreme distress, if, at the time he executes his will, he understands the business in which he is engaged, and has a knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses testamentary capacity: *In re Pickett's Will* (Or.), 89 Pac. Rep. 377, 382; *In re Ames' Will*, 40 Or. 495; 67 Pac. Rep. 737; *Bain v. Cline*, 24 Or. 175; 33 Pac. Rep. 542, 543; *In re Buren's Will*, 47 Or. 307; 83 Pac. Rep. 530, 531. A man may be extremely weak and feeble physically, and may be in a dying condition, and yet retain his mental faculties

and will power to such an extent as to enable him to make a valid will, but such a feeble and dying condition is to be given consideration in determining his mental capacity, and is of more significance, where there is also evidence tending directly to show the fact of his feeble mental condition: *Estate of Doolittle* (Cal.), 94 Pac. Rep. 240, 242.

REFERENCES.

Testamentary capacity as affected by age, ill health, etc.: See note *Kerr's Cal. Cyc. Civ. Code*, § 1270.

(3) **As affected by fraud, undue influence, etc.** A mere confidential relation existing between the testator and a beneficiary under a will, or the opportunity of such beneficiary to exercise undue influence over the testator, is not enough to avoid a will. The fraud or undue influence that will suffice to set aside a will, must be such as to overcome the free volition or conscious judgment of the testator, and to substitute the wicked purpose of another instead, and must be the efficient cause, without which the obnoxious disposition would not have been made: *In re Turner's Will* (Or.), 93 Pac. Rep. 461, 464; *In re Holman's Will*, 42 Or. 345; 70 Pac. Rep. 908. Undue influence is defined to be the use, by one in whom a confidence is reposed by another, who holds a real or apparent authority over him, of such confidence or authority, for the purpose of obtaining an unfair advantage of his weakness of mind, or of his necessities or distress: *Dolliver v. Dolliver*, 94 Cal. 646; 30 Pac. Rep. 4. The question as to the boundary of legitimate influence must be determined by a consideration of the relation between the parties, the character, strength, and condition of each of them, the circumstances of the case, and the application of sound practical sense to the facts of each given case. The mental and physical condition of the testator, and the provisions of the will itself may be considered: *In re Welch's Will* (Cal. App.), 91 Pac. Rep. 336, 337.

REFERENCES.

Effect of unnatural testamentary disposition on question of undue influence: See note 6 L. R. A. (N. S.) 202, 204. Fraud and undue influence in connection with drunkenness, as affecting testamentary capacity: See note 39 L. R. A. 220. Declarations of a testator, not made at the time of the execution of his will, admissibility of, on question of undue influence: See note 10 Am. & Eng. Ann. Cas. 600.

4. Formalities and execution.

(1) **In general.** The form in which a will is drafted is no part of its execution, and the legislature has not attempted to prescribe the form in which the testator shall express his testamentary purpose, or in which the will shall be drafted, but only the form in which it is to be executed and attested: *Estate of Seaman*, 146 Cal. 455; 80 Pac.

Rep. 700, 702; Estate of Blake, 136 Cal. 306; 68 Pac. Rep. 827; 89 Am. St. Rep. 135. While it is desirable to give effect to the wills of deceased persons, regardless of formality and mistakes occurring through ignorance, where all the requirements of the statute have been complied with, and the intent of the testator is clear, it would be a dangerous precedent to establish, to hold an instrument lacking in the statutory requirements, to be such a valid will as conveys real estate: *Osborne v. Atkinson* (Kan.), 94 Pac. Rep. 796, 798.

REFERENCES.

Attestation of will: See note 1 L. R. A. (N. S.) 393. The attestation and witnessing of wills: See note 114 Am. St. Rep. 209-239. Formal execution of will, what law governs: See note 8 L. R. A. 823-827. Instrument, when a will: See note *Wilson v. Carrico*, 49 Am. St. Rep. 221. Sufficiency of letter as will: See note 15 L. R. A. 635. Testamentary writings or wills, as to what constitute: See notes 92 Am. Dec. 284; 30 Am. St. Rep. 717; 89 Am. St. Rep. 486-500. Valid testamentary disposition, requisites of: See note 1 Am. & Eng. Ann. Cas. 51. What is a sufficient execution, by will, of a power of appointment: See note 64 L. R. A. 849-918. Consult notes to the following sections of *Kerr's Cal. Cyc. Civ. Code*, as to the subjects indicated: Will of married woman, § 1273; several testamentary instruments, when taken and construed together, § 1320; wills, elements of, formalities as to execution, § 1270; execution and attestation of wills, generally, § 1276.

(2) **Signature of testator.** The purpose of the statute which requires that the testator's name shall be subscribed at the end of the will, is not only that it may thereby appear upon the face of the instrument, that the testamentary purpose, which is expressed therein, is a completed one, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature: *Estate of Seaman*, 146 Cal. 455; 80 Pac. Rep. 700, 702. When a testator attests a will by his mark, it is a sufficient signing, and is a valid mode of executing the will: *Pool v. Buffman*, 3 Or. 428, 442. The language of the code providing that the testator may, "when the person cannot write," make his mark, includes all persons who are unable to write from any cause, even though they know how to write: *In re Guilfoyle's Will*, 96 Cal. 590; 31 Pac. Rep. 553, 554. A mark made by a testatrix is regarded as a subscription to the testament sufficient to satisfy the requirement of the statute; and the name written by another is required to be only near enough to the mark to indicate that the mark was intended to represent the name: *In re Guilfoyle's Will*, 96 Cal. 589; 31 Pac. Rep. 553.

REFERENCES.

Comparison of marks and spelling in wills and other writings: See note 65 L. R. A. 95-100. Does ability to write invalidate signature

made by mark or by aid of other person guiding the pen: See note 7 L. R. A. 1193-1195. Signing wills by marks: See note 22 L. R. A. 370-372. Signature of testator "at end" of will: See note 2 Am. & Eng. Ann. Cas. 730.

(3) **Publication by testator.** The declaration of the testator in the words, "That is my will," made in reference to the instrument, and in the presence of witnesses, is a sufficient publication, under the provisions of the statute: *Estate of Mullin*, 110 Cal. 252; 42 Pac. Rep. 645, 646. An express declaration and request to the subscribing witnesses are not absolutely required of the testator. The requirement of the statute is complied with if, at the time, he did, by words or conduct, convey to them the information that the instrument was his will, and that he desired them to attest it as witnesses: *Estate of Johnson* (Cal.), 93 Pac. Rep. 1015, 1016. The formality of publication by the testator, in any manner, is not, under the Oregon statute, a prerequisite to the validity of a will: *Skinner v. Lewis*, 40 Or. 571; 67 Pac. Rep. 951, 953.

(4) **Subscribing witnesses.** A subscribing witness must not only subscribe his name as a witness to the writing, but must attest the signature of the testator, who must sign the will in his presence, or acknowledge to him by word or act that he has signed it: *In re Mendenhall's Will*, 43 Or. 542; 73 Pac. Rep. 1033, 1034, citing *Luper v. Werts*, 19 Or. 122, 126; 23 Pac. Rep. 850, 852. Where the statute provides that a will must be attested and subscribed by two or more competent witnesses, it is as essential that the writing should be so subscribed, as that it shall be signed by the testator in order to be a valid will: *Clark v. Miller*, 65 Kan. 726; 68 Pac. Rep. 1071, 1072. The attestation of a will is not a matter of great importance to the witnesses, and the failure of such persons to remember the occurrences, is not so unusual as to justify the refusal of probate on that account, if there is other satisfactory evidence of the due execution: *Estate of Johnson* (Cal.), 93 Pac. Rep. 1015, 1018. A will is not void because the name of the subscribing witnesses was written by another person. The omission of a mere formality or empty ceremony, no trace of which can be found on the will itself, does not defeat the attestation: *Schnee v. Schnee*, 61 Kan. 643; 60 Pac. Rep. 738, 739. A necessary subscribing witness to a will cannot take a devise thereunder: *In re Klein's Estate*, 35 Mont. 185; 88 Pac. Rep. 798; *Clark v. Miller*, 65 Kan. 726; 68 Pac. Rep. 1071, 1072.

REFERENCES.

Subscription to will by testator and witnesses, order of: See note 5 Am. & Eng. Ann. Cas. 463. Subscription to will by witnesses, sufficiency of: See note 4 Am. & Eng. Ann. Cas. 637. Subscription by witnesses to will in "presence" of testator, what constitutes: See note 6 Am. & Eng. Ann. Cas. 414. Signature of witnesses to will before the

testator signs it: See note 14 L. R. A. 160. Subscribing witnesses to will, competency of: See note *Kerr's Cal. Cyc. Civ. Code*, § 1280.

(5) **Attestation by witnesses.** The attestation is not a matter of mere formality in affixing one's name to the will as a witness. There must be an active mentality connected with it. The witness must be able to say, surely and unequivocally, that the signature to the instrument, previously appended, is that of the person executing: *In re Skinner's Estate*, 40 Or. 571, 583; 62 Pac. Rep. 523; 67 Pac. Rep. 951, 954; cited and affirmed, *In re Mendenhall's Will*, 43 Or. 542; 73 Pac. Rep. 1033, 1035. The purpose of attestation is to make certain that the will offered for probate is the one that was actually executed, and also to surround the testator with witnesses of his own choice, capable of judging and testifying as to his capacity to make a will: *Schnee v. Schnee*, 61 Kan. 643; 60 Pac. Rep. 738, 740. A testator who, by reason of paralysis, is unable to speak, may convey his consent to the provisions of a will prepared at his request, and attest his assent by signs, with the same result as if he could have given full and connected directions: *Rothrock v. Rothrock*, 22 Or. 551; 30 Pac. Rep. 453, 454. "Mere silence" is not enough to show acknowledgment: *Luper v. Werts*, 19 Or. 122, 136; 23 Pac. Rep. 850.

REFERENCES.

Witnessing execution of will, formalities as to: See note *Kerr's Cal. Cyc. Civ. Code*, § 1278.

5. Instruments informally executed, invalid as wills. An instrument purporting on its face to be a will, but which passes no interest, and in terms gives no estate during the life of the makers, but expressly provides that the person in whose behalf the instrument was made shall have that, and that only, of which the makers die possessed, and which instrument was not attested or subscribed in the presence of the parties making the same, by two or more competent witnesses, or by any person other than the makers, is utterly void, either as a conveyance or a will: *Poore v. Poore*, 55 Kan. 687; 41 Pac. Rep. 973, 974. Upon the back of a note payable on demand there was an unsigned memorandum to the effect that, if the note was not paid in full before the payee's death, the makers should expend the amount due on the note for the payee's funeral expenses and for a monument, and for caring for the lot in which he was buried. It was held that the terms of the memorandum, under the facts of this case, did not constitute a defense to the note, although complied with after the payee's death, as such memorandum was a testamentary disposition of property, and invalid unless made by will: *Moore v. Weston*, 13 N. D. 574; 102 N. W. Rep. 163.

REFERENCES.

See subdivision on wills in form of deeds, head-line 8, *infra*.

6. Codicils to wills.

(1) **In general.** Dispositions made by will are not to be disturbed by a codicil further than is necessary to give it effect. The two are to be read together so as to make one consistent whole: *Estate of Barclay* (Cal.), 93 Pac. Rep. 1012, 1014; *Estate of Ladd*, 94 Cal. 674; 30 Pac. Rep. 99; *Estate of Scott*, 141 Cal. 485; 75 Pac. Rep. 44. A clear disposition made by a will is not revoked by a doubtful expression or inconsistent disposition in the codicil. Thus, where a codicil relates only to a one-third share of the residuum of the estate, devised to a certain person, it cannot affect the remaining two-thirds residuum of the estate, which was allowed to remain unaltered by it: *Estate of Domini*, 151 Cal. 181; 90 Pac. Rep. 448, 450. While a codicil which specifically changes the original will, must prevail, yet both the will and codicil must be construed together, and the general intent pervading both must be gathered: *Hunt v. Hunt*, 18 Wash. 14; 50 Pac. Rep. 578, 580. A deed made by a testator three days after the execution of his will, reaffirming the provisions of the will, but which deed was not delivered, even though deemed to be a codicil to the will, does not prevail over another and subsequent codicil: *Pardee v. Kuster* (Wyo.), 89 Pac. Rep. 572, 573. An original holographic will may be changed by a letter in which the testator expressly referred to the will and expressed his intention and wish to change the same: *Barney v. Hays*, 11 Mont. 571; 29 Pac. Rep. 282.

REFERENCES.

Codicil, reference by testator to his will: See note 8 Am. & Eng. Ann. Cas. 429. Effect of codicil: See note 1 L. R. A. (N. S.) 397. Republication of will by codicil: See note *Kerr's Cal. Cyc. Civ. Code*, § 1287.

(2) **Reference to the will.** The execution of a codicil referring to a previous will has the effect of republishing the will, as modified by the codicil, and the two are to be regarded as forming but one instrument, speaking from the date of the codicil: *Payne v. Payne*, 18 Cal. 302. The reference in a codicil must be certain, and to an instrument in existence at the time of the admission of the will to probate, in order to make it, ipso facto, a portion of the will itself by such reference: *Estate of Willey*, 128 Cal. 1; 60 Pac. Rep. 470, 473. Where a will was filed and presented for probate, but the same was refused probate, and, pending an appeal from the order refusing probate, a codicil to the will was discovered, the will together with the codicil may be presented again for probate after the withdrawal of the original application: *Barney v. Hays*, 11 Mont. 99; 27 Pac. Rep. 384, 386. The fact that a codicil is written upon a sheet of paper containing a writing which purports to be testamentary in character, is sufficient to justify the inference that such writing is the will referred to by the codicil: *Estate of Plumel*, 151 Cal. 77; 90 Pac. Rep. 192, 193.

7. **Incorporating other papers by reference.** A will required to be witnessed by two or more persons, or executed with any other prescribed formalities, may nevertheless adopt an existing paper by reference. This incorporation of the paper referred to, into the will, so makes it a part of the instrument that no distinct proof of the paper or even filing, in the probate court, is required: *Estate of Willey*, 128 Cal. 1; 60 Pac. Rep. 470, 473. Where a wife, in her will, directs distribution of the residue of her property "in accordance with the provisions made in the last will of my husband concerning the same," the wife thus adopts and makes the husband's will a part of her own will by reference, though the husband's will was admitted to probate several years before the wife's will was written: *Gerrish v. Gerrish*, 8 Or. 351, 353.

REFERENCES.

Incorporation into will by reference, doctrine of: See note 1 Am. & Eng. Ann. Cas. 395; 9 Am. & Eng. Ann. Cas. 105. Incorporation of extrinsic papers into wills: See notes 107 Am. St. Rep. 70-75; 68 L. R. A. 353-386.

8. Wills in form of deeds.

(1) **In general.** An instrument which is in form and substance a deed between two parties by which one grants and transfers to the other certain property, and which does not contain any of the usual words of devise or bequest, or any word equivalent thereto, is not a will, and cannot be probated as such: *Estate of Hall*, 36 Cal. Dec. 399, 400 (Nov. 13, 1908). In determining whether an instrument is a deed or a will, the question is: Did the maker intend to convey any estate or interest whatever to vest before his death, and upon the execution of the paper? Or, on the other hand, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed; if the latter, a will: *Powers v. Scharling*, 64 Kan. 343; 67 Pac. Rep. 821; *Pentico v. Hays* (Kan.), 88 Pac. Rep. 738, 739. And, where testamentary, it is revocable: *Sappingfield v. King* (Or.), 89 Pac. Rep. 142, 144. If an instrument in writing passes a present interest in real estate, although the right to its possession and enjoyment may not accrue until some future time, it is a deed or contract; but, if the instrument does not pass an interest or right until the death of the maker, it is a will or testamentary paper: *Reed v. Hazleton*, 37 Kan. 321; 15 Pac. Rep. 177, 180. An instrument in writing may be a contract as to property described therein, and a testamentary instrument, concerning other property described or referred to therein: *Reed v. Hazleton*, 37 Kan. 321; 15 Pac. Rep. 177, 179. A deed, if in fact made a codicil to a will, must be construed as a part thereof, and in such construction the terms of the codicil later in date must govern it when repugnant to, or in conflict with, the terms of the will or prior codicil; and, in this sense, the word "will" is used to mean will as

first executed, together with all codicils, be they many or few, which have been added thereto, and the meaning and effect of which, taken together, is reaffirmed or changed by the last codicil. The will so changed or reaffirmed speaks from the date of its republication by the last codicil: *Pardee v. Kuster* (Wyo.), 89 Pac. Rep. 572, 573.

REFERENCES.

See head-line 5, *supra*.

(2) **Particular examples.** A deed is in form and effect testamentary, if it provides that "this deed is made with the full understanding and upon the condition that the same shall take effect from, and after the death of the said grantor." Such a deed is revocable: *Sappingfield v. King* (Or.), 89 Pac. Rep. 142, 143. An instrument in form and substance a deed between two parties, by which one grants and transfers to the other certain property, and which does not contain any of the usual words of devise and bequest, nor any words equivalent thereto, is not a will, and is properly denied probate: *Estate of Hall*, 149 Cal. 143; 84 Pac. Rep. 839, 840. An instrument in the form of a grant, bargain, and sale deed, which contains the express condition "that in the event the said party of the second part shall die before the death of the said party of the first part, then and in that event the estate hereby conveyed shall revert to and vest in the said party of the first part just as if this deed had not been made," and which deed reserves a life estate in the grantor, "and further reserving to himself the power to mortgage, encumber, sell, lease, convey, or otherwise dispose of said real estate, at any time, upon such terms and conditions, and for such sums as to him, the said party of the first part may seem meet and proper," is not testamentary in character, and the reservation as to the control of the property, "to convey," etc., relates only to the life interest: *Brady v. Fuller* (Kan.), 96 Pac. Rep. 854, 856. An instrument testamentary in character and executed in the form required for a will, cannot be denied probate upon the ground that some of its provisions are invalid or contrary to the provisions of law. The probate of the instrument merely determines the validity of its execution. The sufficiency or invalidity of its provisions are to be determined when effect is sought to be given them. The statute makes no provision by which a portion of such an instrument can be admitted to probate and probate denied as to the remainder: *Estate of Cobb*, 49 Cal. 599, 604; *Estate of Murphy*, 104 Cal. 554, 566; 38 Pac. Rep. 543; *Tolland v. Tolland*, 123 Cal. 140, 144; 55 Pac. Rep. 681; *Estate of Pfarr*, 144 Cal. 121, 125; 77 Pac. Rep. 825. An instrument in the form of a deed, by the terms of which a present interest was conveyed to the children of the person executing the same, but, by which, their enjoyment of the estate was postponed until after her death, will be given effect as a deed and not as a will, for if it be not a deed, it fails

of any purpose, where it is not so witnessed as to be valid as a will: *Love v. Blauw*, 61 Kan. 496; 59 Pac. Rep. 1059, 1061. Where there is no fraud or collusion, deeds, not testamentary in character, are valid only as such: *Phillips v. Phillips*, 30 Col. 515; 71 Pac. Rep. 363, 365. A deed of trust may be testamentary in character: *Cross v. Benson*, 68 Kan. 495; 75 Pac. Rep. 558, 562.

REFERENCES.

Deed, construction of instrument in form of, to become effective upon death of grantor: See note 7 Am. & Eng. Ann. Cas. 790. May an instrument, not on its face of a testamentary character, be shown by extrinsic evidence to be such, so as to take effect as a will? See note 13 L. R. A. (N. S.) 1203, 1204.

9. Contract to make a will. A special contract, under the Washington Code, which code provides that the husband and wife may jointly enter into any agreement concerning the status of the whole, or any portion, of the community property then owned by them or afterward to be acquired, to take effect upon the death of either, is not a will, and is not governed by the laws relating to the construction of wills: *McKnight v. McDonald*, 34 Wash. 98; 74 Pac. Rep. 1060, 1061.

REFERENCES.

Devise of land, validity of oral agreement to make: See note 5 Am. & Eng. Ann. Cas. 495.

10. Escrow deed, when not a will. A deed executed and delivered in escrow, to take effect upon the performance of certain conditions to be observed by the grantee therein, can have no effect as a testamentary disposition of property, upon the death of the grantor therein named, where there is nothing in the record indicating that it was thus intended: *De Bow v. Wollenberg* (Or.), 96 Pac. Rep. 536, 543.

11. Deed construed in aid of will. Where a deed was executed for the purpose of more effectually carrying out the provisions of a will, the instruments will be construed together, where it appears that it was intended that the wife should have a life estate, and that the deed was executed as evidence of her consent to the provisions of the will: *Jack v. Hooker*, 71 Kan. 652; 81 Pac. Rep. 203, 205.

12. Holographic wills.

(1) **In general.** Where a decedent had executed a holographic will, and afterward, in a letter announcing his marriage, wrote to his attorney to the effect that he wanted to have the will changed, "so that she (his wife) will be entitled to all that belongs to her as my wife"; it was held that the decedent's intention was clear as to the

disposition of his property, and as to his wife. Where the expression of the intention is clear, the intent must not be ignored because the language is not technical: *Barney v. Hays*, 11 Mont. 571; 29 Pac. Rep. 282. A holographic codicil entirely in the handwriting of the testator, with the exception of the name of a witness and his address, is valid, where it does not appear that there was any attempt to make an attestation of the codicil, but where the name of the witness may have been placed there to supply proof of the handwriting, or proof of the fact that the codicil was holographic: *Estate of Soher*, 78 Cal. 477; 21 Pac. Rep. 8. A holographic will examined and construed as making the husband a residuary legatee, although the name of the husband was separated, in the will, from the portion creating the bequest, by the name of the testatrix. The testimony of witnesses, as to unfriendly treatment of the testatrix by her husband, is inadmissible to authorize a conclusion that she intended to exclude him from sharing in her estate: *Stratton's Estate v. Morgan*, 112 Cal. 513; 44 Pac. Rep. 1028, 1029. Under the Wyoming statute, it is required that all wills, including holographic wills, be witnessed by two competent witnesses; otherwise, they are not valid. The law does not except holographic wills from this provision, and where the instrument offered for probate is not witnessed, it is invalid: *Neer v. Courick*, 4 Wyo. 49; 31 Pac. Rep. 862, 864. While an instrument purporting to be a holographic will, may, for failure to conform to the statutory requirements, be invalid as such a will, the same may be incorporated by reference in a codicil complying with the requirements of the law regarding holographic wills, and becomes thereby, with such codicil, the will of the testator; and both, where offered for probate, as the will of the decedent, are properly admitted to probate as a holographic will: *Estate of Plumel*, 151 Cal. 77; 90 Pac. Rep. 192, 193. The following holographic instrument has been held to be testamentary in character, and not vague, uncertain, or ambiguous as to the intent of the testator; to wit "Crolldepdro, february 3, 1892. this is to serify that ie levet to mey wife Real and persnal and she to dispose for them as she wis. Patrick Donohue": *Mitchell v. Donohue*, 100 Cal. 202; 34 Pac. Rep. 614.

REFERENCES.

Holographic wills: See notes *Kerr's Cal. Cyc. Civ. Code*, § 1277; 6 L. R. A. 775; 52 Am. Dec. 591-593; 104 Am. St. Rep. 22-34. Holographic will, rule requiring to be found "among valuable papers": See note 5 Am. & Eng. Ann. Cas. 636. Codicil to holographic will: See note *Kerr's Cal. Cyc. Civ. Code*, § 1277.

(2) **Formalities in executing.** Where a will is holographic, and written upon two separate sheets of paper, the mere fact that the will is found upon separate sheets is immaterial, and where the apparent difference in handwriting on separate sheets is explained only by

conjecture or speculation, the finding of the court, to the effect that the will was "one continuous instrument and a single document," should not be set aside: *Estate of Traylor*, 126 Cal. 97; 58 Pac. Rep. 454, 455. The date in a holographic will is not a material thing, although made necessary by the statute. It is a means of identification, and aids in determining the authenticity of the will; but the main and essential thing is, that the will be wholly written and signed by the hand of the testator. An erroneous date in such a will does not invalidate it, and an order refusing to admit the will to probate for this reason alone, is erroneous: *Estate of Fay*, 145 Cal. 82; 78 Pac. Rep. 340, 341. Where a holographic will gives a date in connection with memoranda as to the ownership of certain items of property, such date will be regarded as the date of the will, and is a sufficient compliance with the statute. It is immaterial that the memoranda as to the property shows cancellation, where the date itself was not canceled: *Estate of Clisby*, 145 Cal. 407; 78 Pac. Rep. 964. A mistake or error in the date of a holographic will does not invalidate the will, and it will be presumed that the date given is the true date: *Estate of Fay*, 145 Cal. 82, 83; 78 Pac. Rep. 340, 341. Under the California statute a holographic will is not required to be "subscribed by the testator at the end thereof." It is sufficient that it be "signed" by him, and this signing may be at the beginning, or any other part of the document: *Stratton's Estate v. Morgan*, 112 Cal. 513; 44 Pac. Rep. 1028, 1029. A holographic codicil to a will theretofore made, and which will was not entirely in the handwriting of the testator, adopts the will by reference, and the latter, in contemplation of law, becomes a part of the document making the reference: *Estate of Soher*, 78 Cal. 477; 21 Pac. Rep. 8, 9.

REFERENCES.

Holographic will not wholly in handwriting of testator: See note 1 Am. & Eng. Ann. Cas. 373.

(3) **Holographic will by married woman.** Under the Idaho statute, the will of a married woman "must be attested, witnessed, and proved in like manner as all other wills." But this does not extend the power to married women to make a holographic will: *Scott v. Hartness*, 6 Ida. 736; 59 Pac. Rep. 556, 557.

13. Nuncupative wills. Under the statute requiring that a nuncupative will must be made, at the time of the last sickness of the testator, the words, "at the time of the last sickness," must be taken in their ordinary signification. The statute requires it to be proved that the will was made "in the last sickness," and it is a reasonable and necessary implication that it must also appear that the testator, at the time of making the will, supposed that such sick-

ness would prove his last sickness; in other words, that he should be impressed with the probability that he would never recover: In *re Miller's Estate* (Wash.), 91 Pac. Rep. 967, 968; quoting from, and approving, *Harrington v. Stees*, 82 Ill. 50; 25 Am. Rep. 290. Under the Oklahoma statute, to make a nuncupative will valid, the decedent must, at the time, be in actual military service in the field, or doing duty on shipboard at sea. Even a soldier who is not in the field, nor the person doing duty on shipboard not at sea, cannot make a nuncupative will: *Ray v. Wiley*, 11 Okl. 720; 69 Pac. Rep. 809, 810.

REFERENCES.

Nuncupative will, how executed: See note *Kerr's Cal. Cyc. Civ. Code*, § 1288. Nuncupative will: See notes 8 L. R. A. 40; 9 L. R. A. 829. Nuncupative will, statutory restrictions as to time of making: See note 3 Am. & Eng. Ann. Cas. 317. What is "last sickness," permitting a nuncupative will: See note 13 L. R. A. (N. S.) 1092-1094. Requisites of valid nuncupative will: See note *Kerr's Cal. Cyc. Civ. Code*, § 1289.

14. Mutual or reciprocal wills. Where a husband and wife arranged for the disposition of their property after their death, one by will and the other by deed, and both deed and will were placed in a bank where they remained until the death of the husband, when the will was removed, it was held that the deed, given under such circumstances, was testamentary in character, and that the grantor therein did not intend to make a delivery, except such as was subject to recall: *Sappingfield v. King* (Or.), 89 Pac. Rep. 142, 143. The most that can be said of such instruments is that they are mutual and reciprocal, and that each stands as an independent will unaffected by the other: *Sappingfield v. King* (Or.), 90 Pac. Rep. 150.

REFERENCES.

Mutual or conjoint wills: See note *Kerr's Cal. Cyc. Civ. Code*, § 1279.

15. Foreign wills. In construing a foreign will, in the absence of a contrary showing, to be gathered from the circumstances surrounding the testator, or from the instrument as a whole, the sense of words used by him is to be ascertained in the light of the law of his domicile: *Keith v. Eaton*, 58 Kan. 732; 51 Pac. Rep. 271, 272. A will executed in the territory of New Mexico, while it was a portion of the republic of Mexico, in accordance with prevailing customs and usages in that territory, having the force of law, though not in accordance with the laws of Mexico, will be given effect as a valid will, *ex necessitate rei*, in the courts of New Mexico: *Gildersleeve v. New Mexico Min. Co.*, 6 N. M. 27; 27 Pac. Rep. 318, 322; and see cases cited in opinion for application of rule in other jurisdictions.

REFERENCES.

Foreign wills: See note *Kerr's Cal. Cyc. Civ. Code*, § 1285. Foreign will construed as giving a life interest in a mortgage: *Crandall v. Barker*, 8 N. D. 263; 78 N. W. Rep. 347. Foreign will construed as giving absolute ownership of a mortgage: *Knox v. Barker*, 8 N. D. 272; 78 N. W. Rep. 352. Conflict of laws as to wills: See note 2 L. R. A. (N. S.) 408-468. Laws governing validity and interpretation of wills: See note *Kerr's Cal. Cyc. Civ. Code*, § 1376.

16. **Non-intervention wills.** Under the Washington statute, provision is made for the execution of a non-intervention will, the purpose of which is to authorize one while living, and when competent, to provide for the management, disposition, and distribution of his property after death without administration in the probate court. As to such wills the procedure controlling the administration in probate is not applicable: *State v. Superior Court*, 21 Wash. 575; 59 Pac. Rep. 483, 484. Where, under a non-intervention will, the property of the estate vested in the devisees mentioned in the will, and they had conveyed title thereto for a valuable consideration, and the trust relative to the property was concluded, subsequent proceedings in the probate courts were without authority and void: *English-McCaffery Logging Co. v. Clowe*, 29 Wash. 721; 70 Pac. Rep. 138. The statute of Washington providing for non-intervention wills must be given full force and effect in all cases coming clearly within its terms. Under that statute, estates may be withdrawn from the jurisdiction and control of the county court, and the acts of the executors under the will, so long as they faithfully comply with its provisions, cannot be called in question: *Newport v. Newport*, 5 Wash. 114; 31 Pac. Rep. 428, 430.

17. **Instruments construed not to be wills.** A written instrument as follows: "San Francisco, February 4th, 1901. For services rendered, I, the undersigned, leave to Mrs. McCloskey the balance of my account with the German Savings & Loan Society, which amounts to date \$789.85 (seven hundred eighty-nine dollars and eighty-five cents). Nicholas Murphy,"—executed by the assignor in view of his impending death, and accompanied by the delivery of the bank-book showing the account, is construed as a present assignment of the claim and not as a testamentary disposition of the fund in bank: *McCloskey v. Tierney*, 141 Cal. 101; 74 Pac. Rep. 699. A warranty deed, containing full covenants and conveying title in fee simple, is not a will: *Jones v. Jones* (S. D.), 104 N. W. Rep. 23, 26.

18. **Will as evidence.** A naked unprobated will is not admissible in evidence as a muniment of title in ejectment: *Jones v. Doe*, 6 Or. 188, 191.

II. REVOCATION OF WILLS.

1. **Revocation in general.** A revocation of a will is made where the testator obliterates or cancels his name, where it appears in the will, and where such obliteration is made in the presence of witnesses to whom the testator states that the will is revoked: *In re Glass' Estate*, 14 Col. App. 377; 60 Pac. Rep. 186, 187. Any obliteration or cancelation is effective to revoke a will, if done with an intent to destroy the instrument, and render it ineffectual for the purposes for which it was originally executed: *In re Glass' Estate*, 14 Col. App. 377; 60 Pac. Rep. 186, 188. A conveyance of property, subsequent to the execution of a will, does not operate as a revocation of the will: *Woodward v. Woodward*, 33 Col. 457; 81 Pac. Rep. 322, 323. The execution of a subsequent power of attorney, by a testator, to his wife named in his will as executrix, ceases to be operative upon the death of the testator, and its execution can, in no sense, be given effect as a revocation of a prior, duly executed will: *In re Kilborn* (Cal. App.), 89 Pac. Rep. 985, 986. A will executed by the testator, and delivered to the residuary legatee, is not a contract in any sense of the term. No obligations are assumed thereunder, and the testator has full liberty to revoke it at any time: *Richardson v. Orth*, 40 Or. 252; 66 Pac. Rep. 925.

REFERENCES.

Revocation of will by subsequent will, and revival of first by destruction of second: See notes 37 L. R. A. 561-579. Codicil, revival of will by: See note 1 Am. & Eng. Ann. Cas. 671. Cancelation or mutilation of will as affected by invalidity of a second will: See note 6 L. R. A. (N. S.) 1107-1110. Revocation, revival, and republication of will: See notes 5 L. R. A. 346; 7 L. R. A. 485-488; 28 Am. St. Rep. 344-362. Revival of will by destruction of revoking will: See note 4 Am. & Eng. Ann. Cas. 313. Revocation, dependent relative, doctrine of: See note 1 Am. & Eng. Ann. Cas. 609. Consult notes to the following sections of *Kerr's Cal. Cyc. Civ. Code* as to the matters indicated: Revocation of written will, § 1292; revocation of will executed in duplicate, § 1295; revocation by subsequent will, § 1296; revocation of will as revoking all codicils, § 1305; provisions as to revocations in statute, to what wills applicable, § 1374; mortgage or other lien not a revocation of will, § 1302; conveyance, when not a revocation, § 1303; when a revocation, § 1304; agreement for sale of property disposed of by will, not a revocation, § 1301; antecedent will, when not revived by revocation of subsequent will, § 1297.

2. **Facts and evidence relating to.** That the will was in the possession of the testator from the time of its execution until his death; that immediately after his death it was found among his effects; and that, when so found, ink-lines were drawn over and through the

name of the person originally named therein as executrix, constitute circumstances sufficient to warrant the court in making a finding that the partial obliteration or cancelation was made by the testator: Estate of Wickersham, 148 Cal. 642; 84 Pac. Rep. 212, 214. See also Estate of Olmstead, 122 Cal. 224; 54 Pac. Rep. 745. Where a will partially obliterated or canceled is found in the possession of the testator, a presumption arises that the obliteration or cancelation was his act, done with intent to cancel or revoke in part or in entirety, as the case may be: Estate of Wickman, 146 Cal. 642; 84 Pac. Rep. 212, 214. The force of evidence tending to show that the testator did not mean to revoke his will is overcome by proof of positive declarations by him made to his wife and other members of his family, that because of some real or fancied grievance, he had in fact destroyed and revoked the will, and intended that his heirs should share and share alike in his estate: *In re McCoy's Estate* (Or.), 90 Pac. Rep. 1105, 1106.

REFERENCES.

Evidence of revocation of will: See note *Kerr's Cal. Cyc. Civ. Code*, § 1293. Declarations, subsequent, of testator on issue of revocation of will, admissibility of: See note 10 *Am. & Eng. Ann. Cas.* 535.

3. **Revocation of trust devise.** Revocation of a trust created by a trust deed cannot be made by a will, where, in the deed of trust, the reservation of power to revoke or to modify is limited to a certain particular way, and where the attempted revocation by will is without the reservation of power prescribed by the trust deed: *Carpenter v. Cook* (Cal.), 60 Pac. Rep. 475.

4. **Revocation by subsequent will.** Two wills executed at different times, the later will providing for a bequest, "according to the condition of a will now in existence," are to be taken together as forming one will, and admitted to probate as such, unless circumstances under which the last will was made prohibit such a condition, or the conditions of the two wills are so repugnant or inconsistent that they may not stand together. But if part is inconsistent, and part consistent, the first will is deemed to be revoked only to the extent of the discordant dispositions, and so far as may be necessary to give effect to the one last made: *Whitney v. Hanington* (Col.), 85 Pac. Rep. 84, 87; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.), 158; 49 *Am. Dec.* 170.

5. **Revocation by marriage, etc.** In California, where an unmarried person has made a will, and afterward marries, the marriage, whether followed by the birth of issue or not, operates, in case of the survival of the wife or children, if any, as a revocation of the will, unless specific provision has been made by the will itself, or by a

marriage contract for the surviving wife, or by some settlement or provision for any surviving children of the marriage: *Sanders v. Simcich*, 65 Cal. 50; 2 Pac. Rep. 741, 742, construing §§ 1298, 1299 of the Civil Code. Under the California statute, "a will executed by an unmarried woman is revoked by her subsequent marriage, and is not revived by the death of her husband"; but this has no application to a will executed by a married woman, whose husband was at the time living, although she subsequently, after the death of her first husband, remarried: *Estate of Comassi*, 107 Cal. 1; 40 Pac. Rep. 15, 17. The marriage of the testator operates to revoke an antecedent will: *Brown v. Sherer*, 5 Col. App. 255; 38 Pac. Rep. 427; *Sherer v. Brown*, 21 Col. 481; 42 Pac. Rep. 668. A will made by a single woman, who afterward marries, and which is allowed to remain, and contains no provision for, or mention of the husband, is revoked by the marriage, where the testatrix dies without issue: *In re Petridge's Will* (Wash.), 91 Pac. Rep. 634. The marriage of a testator, whether or not it be followed by the birth of an heir, is operative to revoke an ante-nuptial will. It does not necessarily follow that where a statute is adopted concerning the revocation of wills, that such statute prohibits the revocation by any other means: *In re Teopfer's Estate*, 12 N. M. 372; 78 Pac. Rep. 53, 54. The effect of the subsequent marriage of a man, on his previously executed will, is to revoke the will, as a matter of law, where the wife is neither mentioned in the will nor provided for by marriage contract: *Griffing v. Gislason* (S. D.), 109 N. W. Rep. 646, 648. The will of an unmarried woman is revoked by her subsequent marriage: *In re Booth's Will*, 40 Or. 154; 66 Pac. Rep. 710, 712. Marriage works a change in the previous obligations and duties of a testator, in requiring him either to make due provision for his wife by will, or to leave her to the inheritance provided by law; and where this duty is not met by the will, the marriage operates as a revocation by presumption of law: *Morgan v. Ireland*, 1 Ida. 786, 790.

REFERENCES.

Effect of subsequent marriage, followed by birth of a child, to revoke a woman's will: See note 5 L. R. A. (N. S.) 1084. Marriage of a man, effect of, on his will: See note *Kerr's Cal. Cyc. Civ. Code*, § 1299. Revocation of will by marriage and birth of issue: See notes 7 Am. & Eng. Ann. Cas. 786. See note *Kerr's Cal. Cyc. Civ. Code*, § 1298. Revocation of will by divorce of testator: See note 3 Am. & Eng. Ann. Cas. 230. Statutory revocation of will by testator's subsequent marriage, extent to which widow's interest is affected thereby: See note 5 Am. & Eng. Ann. Cas. 795. Marriage of a woman, effect of, on her will: See note *Kerr's Cal. Cyc. Civ. Code*, § 1300.

CHAPTER II.

INTERPRETATION OF WILLS, AND EFFECT OF VARIOUS PROVISIONS.

- § 901. Testator's intention to be carried out.
- § 902. Intention to be ascertained from the will.
- § 903. Rules of interpretation.
- § 904. Several instruments are to be taken together.
- § 905. Harmonizing various parts.
- § 906. In what case devise is not affected.
- § 907. When ambiguous or doubtful.
- § 908. Words taken in ordinary sense.
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- § 910. Intestacy to be avoided.
- § 911. Effect of technical words.
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- § 914. Power to devise, how executed by terms of will.
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- § 918. "Heirs," "relatives," "issues," "descendants," etc.
- § 919. Words of donation and of limitation.
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- § 922. When conversion takes effect.
- § 923. When after-born child takes under will.
- § 924. Mistakes and omissions.
- § 925. When devises and bequests vest.
- § 926. When cannot be divested.
- § 927. Death of devisee or legatee.
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- § 929. Conditional devises and bequests.
- § 930. Condition precedent, what.
- § 931. Condition precedent, effect of.
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- § 933. Condition subsequent, what.
- § 934. Devisees, etc., take as tenants in common.
- § 935. Advancements, when adoptions.

CONSTRUCTION AND INTERPRETATION OF WILLS.

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| 1. Construction of words and provisions. | (1) In general. |
| 2. Intention of the testator. | (2) How ascertained. Parol evidence to explain. |

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| 3. Law in force. | 10. Devise to a class. |
| 4. Words and provisions to be given effect, if possible. | 11. Clear devises, when not cut down. |
| 5. Meaning of certain words. | 12. Devises to witnesses. |
| (1) In general. | 13. Invalid parts in will. |
| (2) Devise to "heirs," etc. | 14. Rule favoring testacy. |
| 6. Language of the will. | 15. Partial intestacy. |
| (1) Ambiguous and doubtful words. | 16. Perpetuities. |
| (2) Precatory words. | 17. Charitable bequests. |
| 7. Vague and uncertain provisions. | (1) In general. |
| 8. Conflicting and inconsistent provisions. | (2) Favored by the courts. |
| 9. Indefinite and uncertain devises. | 18. Pretermitted children. |
| | 19. After-born children. |
| | 20. Adopted children. |

§ 901. **Testator's intention to be carried out.** A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible. **Kerr's Cyc. Civ. Code, § 1317.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 164, p. 384.

Montana.* Civ. Code, sec. 1770.

North Dakota.* Rev. Codes 1905, § 5129.

Oklahoma.* Rev. Stats. 1903, sec. 6837.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5576.

South Dakota.* Civ. Code 1904, § 1036.

Utah.* Rev. Stats. 1898, sec. 2767.

Washington. Pierce's Code, § 2360.

§ 902. **Intention to be ascertained from the will.** In case of uncertainty arising upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, exclusive of his oral declarations, **Kerr's Cyc. Civ. Code, § 1318.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1771.

North Dakota.* Rev. Codes 1905, § 5130.

Oklahoma.* Rev. Stats. 1903, sec. 6838.

South Dakota.* Civ. Code 1904, § 1037.

Utah.* Rev. Stats. 1898, sec. 2768.

§ 903. **Rules of interpretation.** In interpreting a will, subject to the law of this state, the rules prescribed by the fol-

lowing sections of this chapter are to be observed, unless an intention to the contrary clearly appears. **Kerr's Cyc. Civ. Code, § 1319.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1772.
New Mexico.* Comp. Laws 1897, sec. 5131.
Oklahoma.* Rev. Stats. 1903, sec. 6839.
South Dakota.* Civ. Code 1904, § 1038.
Utah.* Rev. Stats. 1898, sec. 2769.

§ 904. Several instruments are to be taken together. Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument. **Kerr's Cyc. Civ. Code, § 1320.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1773.
North Dakota.* Rev. Codes 1905, § 5132.
Oklahoma.* Rev. Stats. 1903, sec. 6840.
South Dakota.* Civ. Code 1904, § 1039.
Utah.* Rev. Stats. 1898, sec. 2770.

§ 905. Harmonizing various parts. All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail. **Kerr's Cyc. Civ. Code, § 1321.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.** Civ. Code, sec. 1774.
North Dakota.* Rev. Codes 1905, § 5133.
Oklahoma.* Rev. Stats. 1903, sec. 6841.
South Dakota.* Civ. Code 1904, § 1040.
Utah.* Rev. Stats. 1898, sec. 2771.

§ 906. In what case devise is not affected. A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or by any other words not equally clear and distinct, or by inference or argument from other parts of the will, or by an inaccurate recital of or reference to its

contents in another part of the will. **Kerr's Cyc. Civ. Code, § 1322.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1775.
North Dakota.* Rev. Codes 1905, § 5134.
Oklahoma.* Rev. Stats. 1903, sec. 6842.
South Dakota.* Civ. Code 1904, § 1041.
Utah.* Rev. Stats. 1898, sec. 2772.

§ 907. **When ambiguous or doubtful.** Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto, or recital thereof, in another part of the will. **Kerr's Cyc. Civ. Code, § 1323.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1776.
North Dakota.* Rev. Codes 1905, § 5135.
Oklahoma.* Rev. Stats. 1903, sec. 6843.
South Dakota.* Civ. Code 1904, § 1042.
Utah.* Rev. Stats. 1898, sec. 2773.

§ 908. **Words taken in ordinary sense.** The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained. **Kerr's Cyc. Civ. Code, § 1324.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Montana.* Civ. Code, sec. 1777.
North Dakota.* Rev. Codes 1905, § 5136.
Oklahoma.* Rev. Stats. 1903, sec. 6844.
South Dakota.* Civ. Code 1904, § 1043.
Utah.* Rev. Stats. 1898, sec. 2774.

§ 909. **Words to receive an operative construction.** The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative. **Kerr's Cyc. Civ. Code, § 1325.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1778.
North Dakota.* Rev. Codes 1905, § 5137.
Oklahoma.* Rev. Stats. 1903, sec. 6845.
South Dakota.* Civ. Code 1904, § 1044.
Utah.* Rev. Stats. 1898, sec. 2775.

§ 910. **Intestacy to be avoided.** Of two modes of interpreting a will, that is to be preferred which will prevent a total intestacy. **Kerr's Cyc. Civ. Code, § 1326.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1779.
North Dakota.* Rev. Codes 1905, § 5138.
Oklahoma.* Rev. Stats. 1903, sec. 6846.
South Dakota.* Civ. Code 1904, § 1045.
Utah.* Rev. Stats. 1898, sec. 2776.

§ 911. **Effect of technical words.** Technical words in a will are to be taken in their technical sense, unless the context clearly indicates a contrary intention, or unless it satisfactorily appears that the will was drawn solely by the testator, and that he was unacquainted with such technical sense. **Kerr's Cyc. Civ. Code, § 1327.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Montana.** Civ. Code, sec. 1780.
North Dakota. Rev. Codes 1905, § 5139.
Oklahoma. Rev. Stats. 1903, sec. 6847.
South Dakota. Civ. Code 1904, § 1046.
Utah. Rev. Stats. 1898, sec. 2777.

§ 912. **Technical words not necessary.** Technical words are not necessary to give effect to any species of disposition by a will. **Kerr's Cyc. Civ. Code, § 1328.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1781.
North Dakota.* Rev. Codes 1905, § 5140.
Oklahoma. Rev. Stats. 1903, sec. 6848.
South Dakota.* Civ. Code 1904, § 1047.
Utah.* Rev. Stats. 1898, sec. 2778.

§ 913. Certain words not necessary to pass a fee. The term "heirs," or other words of inheritance, are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited. **Kerr's Cyc. Civ. Code, § 1329.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1782.
North Dakota.* Rev. Codes 1905, § 5141.
Oklahoma.* Rev. Stats. 1903, sec. 6849.
South Dakota.* Civ. Code 1904, § 1048.
Utah.* Rev. Stats. 1898, sec. 2779.

§ 914. Power to devise, how executed by terms of will. Real or personal property embraced in a power to devise, passes by a will purporting to devise all the real or personal property of the testator. **Kerr's Cyc. Civ. Code, § 1330.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1783.
North Dakota.* Rev. Codes 1905, § 5142.
Oklahoma.* Rev. Stats. 1903, sec. 6850.
South Dakota.* Civ. Code 1904, § 1049.
Utah.* Rev. Stats. 1898, sec. 2780.

§ 915. Devise or bequest of all real or all personal property, or both. A devise or bequest of all the testator's real or personal property, in express terms, or in any other terms denoting his intent to dispose of all his real or personal property, passes all the real or personal property which he was entitled to dispose of by will at the time of his death. **Kerr's Cyc. Civ. Code, § 1331.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1784.
North Dakota.* Rev. Codes 1905, § 5143.
Oklahoma.* Rev. Stats. 1903, sec. 6851.
South Dakota.* Civ. Code 1904, § 1050.
Utah. Rev. Stats. 1898, sec. 2781.

§ 916. **Residuary clauses.** A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will. **Kerr's Cyc. Civ. Code, § 1332.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1785.

North Dakota.* Rev. Codes 1905, § 5144.

Oklahoma.* Rev. Stats. 1903, sec. 6852.

South Dakota.* Civ. Code 1904, § 1051.

Utah.* Rev. Stats. 1898, sec. 2782.

§ 917. **Same. Bequest of residue, effect.** A bequest of the residue of the testator's personal property, passes all the personal property which he was entitled to bequeath at the time of his death, not otherwise effectually bequeathed by his will. **Kerr's Cyc. Civ. Code, § 1333.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1786.

North Dakota.* Rev. Codes 1905, § 5145.

Oklahoma.* Rev. Stats. 1903, sec. 6853.

South Dakota.* Civ. Code 1904, § 1052.

Utah.* Rev. Stats. 1898, sec. 2783.

§ 918. **"Heirs," "relatives," "issue," "descendants," etc.** A testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," or "personal representatives," or "family," "issue," "descendants," "nearest" or "next of kin," of any person, without other words of qualification, and when the terms are used as words of donation, and not of limitation, vests the property in those who would be entitled to succeed to the property of such person, according to the provisions of the title on succession, in this code. **Kerr's Cyc. Civ. Code, § 1334.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 160, p. 383; sec. 165, p. 384.

Kansas. Gen. Stats. 1905, § 8722.

Montana.* Civ. Code, sec. 1787.

North Dakota.* Rev. Codes 1905, § 5146.

Oklahoma.* Rev. Stats. 1903, sec. 6854.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5572.

South Dakota.* Civ. Code 1904, § 1053.

Utah.* Rev. Stats. 1898, sec. 2784.

§ 919. **Words of donation and of limitation.** The terms mentioned in the last section are used as words of donation, and not of limitation, when the property is given to the person so designated, directly, and not as a qualification of an estate given to the ancestor of such person. **Kerr's Cyc. Civ. Code, § 1335.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 160, p. 383; sec. 165, p. 384.

Kansas. Gen. Stats. 1905, § 8722.

Montana.* Civ. Code, sec. 1788.

North Dakota.* Rev. Codes 1905, § 5147.

Oklahoma.* Rev. Stats. 1903, sec. 6855.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5572.

South Dakota.* Civ. Code 1904, § 1054.

Utah.* Rev. Stats. 1898, sec. 2785.

§ 920. **To what time words refer.** Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession. **Kerr's Cyc. Civ. Code, § 1336.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1789.

North Dakota.* Rev. Codes 1905, § 5148.

Oklahoma.* Rev. Stats. 1903, sec. 6856.

South Dakota.* Civ. Code 1904, § 1055.

Utah.* Rev. Stats. 1898, sec. 2786.

§ 921. **Devise or bequest to a class.** A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed. **Kerr's Cyc. Civ. Code, § 1337.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1790.

North Dakota.* Rev. Codes 1905, § 5149.

Oklahoma.* Rev. Stats. 1903, sec. 6857.

South Dakota.* Civ. Code 1904, § 1056.

Utah.* Rev. Stats. 1898, sec. 2787.

§ 922. **When conversion takes effect.** When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death. **Kerr's Cyc. Civ. Code, § 1338.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1791.

North Dakota.* Rev. Codes 1905, § 5150.

Oklahoma.* Rev. Stats. 1903, sec. 6858.

South Dakota.* Civ. Code 1904, § 1057.

Utah.* Rev. Stats. 1898, sec. 2788.

§ 923. **When after-born child takes under will.** A child conceived before, but not born until after a testator's death, or any other period when a disposition to a class vests in right or in possession, takes, if answering to the description of the class. **Kerr's Cyc. Civ. Code, § 1339.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1792.

North Dakota.* Rev. Codes 1905, § 5151.

Oklahoma.* Rev. Stats. 1903, sec. 6859.

South Dakota.* Civ. Code 1904, § 1058.

Utah.* Rev. Stats. 1898, sec. 2789.

§ 924. **Mistakes and omissions.** When, applying a will, it is found that there is an imperfect description, or that no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received. **Kerr's Cyc. Civ. Code, § 1340.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1793.
North Dakota.* Rev. Codes 1905, § 5152.
Oklahoma.* Rev. Stats. 1903, sec. 6860.
South Dakota.* Civ. Code 1904, § 1059.
Utah.* Rev. Stats. 1898, sec. 2790.

§ 925. When devises and bequests vest. Testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death. **Kerr's Cyc. Civ. Code, § 1341.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1794.
North Dakota.* Rev. Codes 1905, § 5153.
Oklahoma.* Rev. Stats. 1903, sec. 6861.
South Dakota.* Civ. Code 1904, § 1060.
Utah.* Rev. Stats. 1898, sec. 2791.

§ 926. When cannot be divested. A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose. **Kerr's Cyc. Civ. Code, § 1342.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1795.
North Dakota.* Rev. Codes 1905, § 5154.
Oklahoma.* Rev. Stats. 1903, sec. 6862.
South Dakota.* Civ. Code 1904, § 1060.
Utah.* Rev. Stats. 1898, sec. 2792.

§ 927. Death of devisee or legatee. If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute some other in his place, except as provided in section thirteen hundred and ten. **Kerr's Cyc. Civ. Code, § 1343.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1796.
North Dakota.* Rev. Codes 1905, § 5155.

Oklahoma.* Rev. Stats. 1903, sec. 6863.

South Dakota.* Civ. Code 1904, § 1062.

Utah.* Rev. Stats. 1898, sec. 2793.

§ 928. **Interests in remainder are not affected.** The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder, who survive the testator. **Kerr's Cyc. Civ. Code, § 1344.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1797.

North Dakota.* Rev. Codes 1905, § 5156.

Oklahoma.* Rev. Stats. 1903, sec. 6864.

South Dakota.* Civ. Code 1904, § 1063.

Utah.* Rev. Stats. 1898, sec. 2794.

§ 929. **Conditional devises and bequests.** A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated. **Kerr's Cyc. Civ. Code, § 1345.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1798.

North Dakota.* Rev. Codes 1905, § 5157.

Oklahoma.* Rev. Stats. 1903, sec. 6865.

South Dakota.* Civ. Code 1904, § 1064.

Utah.* Rev. Stats. 1898, sec. 2795.

§ 930. **Condition precedent, what.** A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect. **Kerr's Cyc. Civ. Code, § 1346.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1799.

North Dakota.* Rev. Codes 1905, § 5158.

Oklahoma.* Rev. Stats. 1903, sec. 6866.

South Dakota.* Civ. Code 1904, § 1065.

Utah.* Rev. Stats. 1898, sec. 2796.

§ 931. **Condition precedent, effect of.** Where a testamentary disposition is made upon a condition precedent, nothing

vests until the condition is fulfilled, except where such fulfilment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof, and the impossibility was unknown to the testator, or arose from an unavoidable event subsequent to the execution of the will. **Kerr's Cyc. Civ. Code, § 1347.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1800.
- North Dakota.*** Rev. Codes 1905, § 5159.
- Oklahoma.*** Rev. Stats. 1903, sec. 6867.
- South Dakota.*** Civ. Code 1904, § 1066.
- Utah.*** Rev. Stats. 1898, sec. 2797.

§ 932. Condition precedent, when deemed performed. A condition precedent in a will is to be deemed performed when the testator's intention has been substantially, though not literally, complied with. **Kerr's Cyc. Civ. Code, § 1348.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1801.
- North Dakota.*** Rev. Codes 1905, § 5160.
- Oklahoma.*** Rev. Stats. 1903, sec. 6868.
- South Dakota.*** Civ. Code 1904, § 1067.
- Utah.*** Rev. Stats. 1898, sec. 2798.

§ 933. Condition subsequent, what. A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to be divested by some subsequent act or event. **Kerr's Cyc. Civ. Code, § 1349.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1802.
- North Dakota.*** Rev. Codes 1905, § 5161.
- Oklahoma.*** Rev. Stats. 1903, sec. 6869.
- South Dakota.*** Civ. Code 1904, § 1068.
- Utah.*** Rev. Stats. 1898, sec. 2799.

§ 934. Devisees, etc., take as tenants in common. A devise or legacy given to more than one person vests in them as owners in common. **Kerr's Cyc. Civ. Code, § 1350.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1803.**North Dakota.*** Rev. Codes 1905, § 5162.**Oklahoma.*** Rev. Stats. 1903, sec. 6870.**South Dakota.*** Civ. Code 1904, § 1069.**Utah.*** Rev. Stats. 1898, sec. 2800.

§ 935. **Advancements, when adempptions.** Advancements or gifts are not to be taken as adempptions of general legacies, unless such intention is expressed by the testator in writing. **Kerr's Cyc. Civ. Code, § 1351.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1804.**North Dakota.*** Rev. Codes 1905, § 5163.**Oklahoma.*** Rev. Stats. 1903, sec. 6871.**South Dakota.*** Civ. Code 1904, § 1070.**Utah.*** Rev. Stats. 1898, sec. 2801.**CONSTRUCTION AND INTERPRETATION OF WILLS.**

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| 1. Construction of words and provisions. | 8. Conflicting and inconsistent provisions. |
| 2. Intention of the testator. | 9. Indefinite and uncertain devises. |
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| (1) In general. | 15. Partial intestacy. |
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| | 20. Adopted children. |

1. **Construction of words and provisions.** If a will provides for a legacy to employees, the word "employees" refers only to those in regular and continual service. It does not refer to one who is engaged in rendering services in a particular transaction, and whose engagement is rather that of a contractor than that of an employee: *In re Klein's Estate*, 35 Mont. 185; 88 Pac. Rep. 798. Whenever

necessary, in order to ascertain the intent with which words are used, and to give them effect when their meaning is ascertained, the disjunctive "or" will be read conjunctively, and vice versa: *Noble v. Teeple*, 58 Kan. 398; 49 Pac. Rep. 598, 599. Where a will recites, "I do declare hereby that I have by deed of gift conveyed, subject to the encumbrances thereon, to my wife, certain mortgaged premises, etc.," the deed of gift, although silent as to the mortgage, will not support a covenant, by implication, against the encumbrances. The executors are therefore not authorized to pay out of the estate a claim for the amount of the encumbrances upon the property, and an order surcharging their account with such amount if paid is proper: *Estate of Wells* (Cal. App.), 94 Pac. Rep. 856, 857. By a bequest, "of my books," a testator cannot be said to have meant to bequeath money in bank, evidenced by bank-books: *Estate of Jeffreys*, 1 Cal. App. 524; 82 Pac. Rep. 549. Where a testator makes a provision in his will for the employees of a "firm" who had been such for a period of one year immediately prior to his death, in which firm he was interested, and which was a copartnership at the time of the execution of the will, and later, became an incorporated concern under the same name; the word 'firm' will not be given a technical and restricted meaning. It would apply to all such employees who had served the required period, whether of the copartnership or of the corporation: *In re Klein's Estate* (Mont.), 88 Pac. Rep. 798. A clause in a will as follows: "The property herein specifically bequeathed or devised shall be delivered when," etc., applies to property in existence and owned by the testator at the time of his death, and which was specifically bequeathed or devised: *In re Campbell's Estate*, 27 Utah, 361; 75 Pac. Rep. 851, 853. The word "ornaments," in its general and ordinary sense, includes articles of jewelry, and where a bequest was made of "so many of my books, pictures, and ornaments," not otherwise bequeathed specifically, "as she (the donee) shall choose to take," the words 'as she shall choose to take,' will be liberally construed in favor of the legatee: *Estate of Traylor*, 75 Cal. 189; 16 Pac. Rep. 774.

REFERENCES.

"Effects," testamentary gift of, will be construed to include real property: See note 7 Am. & Eng. Ann. Cas. 128. Consult notes to the following sections of *Kerr's Cal. Civ. Code*, as to the subjects indicated: Technical words, effect of, § 1327; technical words not necessary, § 1328; words generally to be given their ordinary and grammatical sense, § 1324; words referring to death or survivorship, effect of, § 1336; particular words construed, as "aforesaid," "between," "children," "grandchildren," "nephew," "niece," "cousin," "desire," "family," "herein," "money," "ornaments," "property," "pro rata," "residue," "revert," § 1324.

2. Intention of the testator.

(1) **In general.** No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by the instrument to dispose of property after his death, and parol evidence as to the attending circumstances is admissible. The courts will, moreover, in reading wills, always supply obviously omitted words, wherever the word omitted is apparent and no other will supply the defect: *Mitchell v. Donohue*, 100 Cal. 202; 34 Pac. Rep. 614. No particular words are essential to create a legacy or devise. The essential thing is that the intention of the testator to make thereby the gift from the property of the estate, is shown. When such intention clearly appears, the courts will carry it into effect, if this can be done consistently with the rules of law applicable: *Estate of Barclay*, 152 Cal. 753; 93 Pac. Rep. 1012, 1014. When land is directed to be sold under a will, and turned into money, courts, in dealing with the subject, will consider it as personalty, and will treat the land as equitably converted in the hands of the executor or trustee: *Martin v. Preston* (Wash.), 94 Pac. Rep. 1087, 1089.

REFERENCES.

Construction of wills, intention to govern: See notes 3 L. R. A. 847-850; 8 L. R. A. 741-749. Interpretation, rules of, generally: See note *Kerr's Cal. Civ. Code*, § 1319.

(2) **How ascertained. Parol evidence to explain.** Parol evidence is admissible to explain a latent ambiguity in a will, as in other writings. If the person to take is not, in some way, described in the devise, evidence will not be admitted to show who was intended; but where there are words of designation, though the true identity of the devisee is not certain through a mistake of the name, the ambiguity may be removed by evidence dehors the will. This is a well-settled rule in respect to devises in general, and it is peculiarly applicable to charitable bequests made to religious corporations: *Reformed Presbyterian Church v. McMillan*, 31 Wash. 643; 72 Pac. Rep. 502, 504. Where extrinsic evidence is admitted to explain a latent ambiguity, and to perfect an imperfect description of beneficiaries, or the subject-matter of devises, or bequests, no evidence is admissible to change or vary the testator's express intent. This must always be deduced from the will itself, assisted by such extrinsic evidence: *Estate of Dominici*, 151 Cal. 181; 90 Pac. Rep. 448, 450; *Estate of Young*, 123 Cal. 337; 55 Pac. Rep. 1011. Where a latent ambiguity in the will is established by parol testimony, and the same testimony explains and removes the ambiguity, the language of the instrument will control: *Modern Woodmen etc. v. Puckett* (Kan.), 94 Pac. Rep. 132, 135. Where a testator conveys a life interest in lands north of a township line described as that portion in township 16, parol evi-

dence is not admissible to prove that the testator intended to devise, by the same description, that portion of the land situated "south" of the township line, or that part which was in another township: *Taylor v. Horst*, 23 Wash. 466; 63 Pac. Rep. 231, 232. The rule excluding oral proof, in explanation of a written instrument, applies to the language of the instrument, and not to its import or construction: *Moreland v. Brady*, 8 Or. 303, 312. Where a testator, in his will, bequeaths to his son all of his property, real, personal, or mixed, and follows with the clause, "that is to say, an undivided one-half interest in said property, or all of which I have power, under the law, to make testamentary disposition, leaving the remaining undivided one-half of said community property to my said wife as the law directs," the wife's half of the property is not disposed of by the will, and should, in the event of her death before that of the testator, go to the heirs as the law directs: *Estate of Williamson*, 75 Cal. 317; 17 Pac. Rep. 221, 222. The intention of a testator is to be ascertained from the language of the will and codicil construed together. If the intention expressed in these instruments is clear, transposition of words will not be resorted to: *Adair v. Adair*, 11 N. D. 175; 90 N. W. Rep. 804.

REFERENCES.

Mistakes and omissions in the will: See note *Kerr's Cal. Cyc. Civ. Code*, § 1340. Parol and extrinsic evidence to aid in the construction of wills: See notes 6 L. R. A. 321-324; 4 Prob. Rep. Ann. 467-476. Intention of testator, ascertainment of, where will is uncertain: See note *Kerr's Cal. Cyc. Civ. Code*, § 1318.

3. **Law in force.** A devise of real property is governed by the law of its situs: *In re Stewart's Estate*, 26 Wash. 32; 66 Pac. Rep. 148. The provisions of a will, relating to personal property situate in this state, must be construed according to the law of the domicile of the testator at the time of his death: *Crandell v. Barker*, 8 N. D. 263; 78 N. W. Rep. 347; *Knox v. Barker*, 8 N. D. 272; 78 N. W. Rep. 352.

4. **Words and provisions to be given effect, if possible.** All of the will must, if possible, be given effect. And where a codicil is made, the codicil must be read into the will and as a part of it: *Estate of Koch* (Cal. App.), 96 Pac. Rep. 100, 101.

REFERENCES.

The words of a will are to be given effect rather than an interpretation rendering them inoperative: See note *Kerr's Cal. Cyc. Civ. Code*, § 1325.

5. Meaning of certain words.

(1) **In general.** In the Washington statute, which provides as follows: "When any estate shall be devised to any child, grandchild, or Probate — 99

other relative of the testator, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee would have done in case he had survived the testator"; the word 'relative' does not include the wife, or any other relative by affinity, but embraces only relatives by consanguinity: *In re Renton's Estate*, 10 Wash. 533; 39 Pac. Rep. 145. Where a testator directs in his will that, in the event of one of his sons surviving the other, the surviving son shall have and receive all the property belonging to them, jointly or otherwise, and that, "in the event of" the death of each of said children, naming them, "the residue of my estate, whatever it may be, I give and bequeath to my brother"; the words 'in the event of' mean that one of the children should take all the property in the event the other died before the property was exhausted, and the brother is entitled, upon the happening of the death of the children, to the residue of the unconsumed portion of the estate, as against heirs of the last surviving child: *Woolverton v. Johnson*, 69 Kan. 708; 77 Pac. Rep. 559, 560, 562. The word "family" is not a technical word, but is of flexible meaning. It is sometimes used to include parents with their children, whether dwelling together or not. It also has a broader and secondary meaning, which includes all the offspring or decedents of a progenitor, but it is not to receive this construction unless such intention is manifested from the context: *Estate of Bennett*, 134 Cal. 320; 66 Pac. Rep. 370, 371. The words "go to," used in a will, are usual, clear, and sufficient words of direct devise: *Estate of Dunphy*, 147 Cal. 95; 81 Pac. Rep. 315, 317. If it is manifest, from the context, or from the provisions of the will, that the testator used the word "residue" in a restricted sense, it will be given the meaning in which it is clear that the testator used it: *Estate of Koch* (Cal. App.), 96 Pac. Rep. 100, 101. Where an estate is given to a beneficiary, "if she remains unmarried," the word 'if,' in legal as in ordinary phraseology, imports a condition. Such is not a gift, in the sense of a devise or bequest, for the time during which the grantee remains unmarried: *Estate of Alexander*, 149 Cal. 146; 85 Pac. Rep. 308. The sense in which such words as "also," "besides," and "too," are used, depends largely upon the context: *Platt v. Brannan*, 34 Col. 125; 81 Pac. Rep. 755; *Estate of Buhrmeister*, 1 Cal. App. 80; 81 Pac. Rep. 752.

(2) Devise to "heirs," etc. In determining in what particular sense the testator used the word "heirs," resort must be had to the context of the will, and the instrument, in general, and as a whole. It may appear from the context that the testator used the word "heir" or "heirs," not in a strict and primary sense, but in a limited sense, and as synonymous with the words "child" and "children": *Coleman v. Coleman*, 69 Kan. 39; 76 Pac. Rep. 439. The words "fall to her children," in a will, create by inartistic phrase, a

remainder in fee,—the word 'children' being a word of purchase: *Lohmuller v. Mosher* (Kan.), 87 Pac. Rep. 1140, 1141. The words "all my heirs," are not to be taken solely as meaning those who take in case of intestacy, but must be considered in their relation to other words, and the context of the will: *De Laurencel v. De Boom*, 67 Cal. 362; 7 Pac. Rep. 758. A devise of "all that piece and parcel of land," without the use of the word "heirs," carries the fee: *Keanu v. Kaohi*, 14 Haw. 142, 143.

REFERENCES.

"Blood relations" or "blood relationship," construction of terms: See note 5 Am. & Eng. Ann. Cas. 511. "Children," meaning of term: *Estate of Wardell*, 57 Cal. 484, 491. "Children," when gift to, includes child en ventre sa mere: See note 7 Am. & Eng. Ann. Cas. 134. Disinheriting heirs; heirs are favored at law: See notes 2 L. R. A. 848; 11 L. R. A. 767. "Issue" and "lawful issue," construction of terms as regards illegitimates: See note 5 Am. & Eng. Ann. Cas. 936. "Survivor," when construed to mean "others": See note 4 Am. & Eng. Ann. Cas. 581. Testamentary disposition to "heirs," "relations," "nearest relations," "representatives," "legal representatives," "personal representatives," "family," "issue," "decedents," "nearest" or "next of kin," how title vests under, and effect of: See note *Kerr's Cal. Cyc. Civ. Code*, §§ 1334, 1335.

6. Language of the will.

(1) **Ambiguous and doubtful words.** When ambiguity of statement occurs, or provisions are made which are apparently contradictory or inconsistent, then it is the duty of the court, if possible, to learn the circumstances under which the will was made, and to ascertain the relations and feeling existing, at the time of the execution of the will, between the testator and the beneficiaries,—in short, to put itself in the testator's place for the purpose of determining his intention. But where the provisions of the will are unambiguous, and are consistent with each other, there is nothing left for construction or interpretation: *Hurst v. Weaver*, 75 Kan. 758; 90 Pac. Rep. 297, 298. Where the meaning of a will is doubtful or obscure as to the testator's children, it will be presumed that the testator intended to make equal distribution among them: *Kinhead v. Maxwell*, 75 Kan. 50; 88 Pac. Rep. 523, 525. A specific statement as to a thing specified in a will, overcomes a general or class statement where the two cannot be harmonized: *Hurst v. Weaver*, 75 Kan. 758; 90 Pac. Rep. 297, 298.

REFERENCES.

Ambiguous and doubtful expressions, explanation of by recitals in the will: See note *Kerr's Cal. Cyc. Civ. Code*, § 1323. Construing parts of will in relation to each other: See note *Kerr's Cal. Cyc. Civ. Code*, § 1321.

(2) **Precatory words.** Whether, in any given case, the words of a will, precatory in form, are to be interpreted as mandatory in effect, depends upon the true intent of the testator, to be arrived at by a consideration of the context and, perhaps, of the attending circumstances. Where, for example, the testator says, "I desire they (the legatees named) pay over whatever difference there may be in the appraisement or allotment made by their mother for the benefit of my other children, said allotment to be made at the discretion of my wife"; the language of the requirement constitutes a condition precedent, and such legatees acquire title only upon making due compensation, to be determined by the method pointed out: *Mollenkamp v. Farr*, 70 Kan. 786; 79 Pac. Rep. 646, 647. The words "I desire" that my real estate be sold, are the equivalent of the words, "I will" that it be sold. While the desire of the testator for the disposal of his estate is a mere request, when addressed to his devisee, it is to be construed as a command, when addressed to his executor: *Estate of Pforr*, 144 Cal. 121, 128; 77 Pac. Rep. 825; citing *Estate of Marti*, 132 Cal. 666; 61 Pac. Rep. 964; 64 Pac. Rep. 1071.

7. **Vague and uncertain provisions.** A clause in a will requiring executors to purchase lands, indefinitely designated, and uncertain of value or cost, is void for vagueness and uncertainty: *Estate of Traylor*, 81 Cal. 9; 22 Pac. Rep. 297.

REFERENCES.

Correction of misdescription of land in will: See note 6 L. R. A. (N. S.) 942-977. Misnomer in gift to legatee: See note 4 Prob. Rep. Ann. 81.

8. **Conflicting and inconsistent provisions.** Where there is a main intention first expressed in a will, and then a secondary or subservient intention, giving directions with reference thereto, the latest direction is not only performable subsequently, but its performance is secondary and subordinate to, as well as dependent upon, the performance of the precedent and primary direction. Courts must effectuate the intention of the testator in sequential order, so far as rules of law will permit: *Estate of Mayhew*, 4 Cal. App. 162; 87 Pac. Rep. 417, 420. A precedent particular description is not to be impaired by a subsequent general description or reference, and words of reference or explanation will never be permitted to destroy a specific grant: *Portland Trust Co. v. Beattie*, 32 Or. 305; 52 Pac. Rep. 89, 91. Under the rule that subsequent general descriptions or references will not impair a specific grant, it has been held that an irregularly shaped tract of wild, unimproved, unenclosed, forest land, containing 159.75 acres, may be devised by the residuary clause of a will in which such tract is referred as containing "85 acres more or less": *Portland Trust Co. v. Beattie*, 32 Or. 305; 52 Pac. Rep. 89, 90.

9. Indefinite and uncertain devises. A provision in a will providing for the care of a cemetery lot for a period of twenty-five years, is invalid as being too indefinite to be enforced: *Estate of Koppikus*, 1 Cal. App. 84; 81 Pac. Rep. 732, 733.

10. Devise to a class. If a class is named as devisees, all of that class shall share under the will equally: *De Laurencel v. De Boom*, 67 Cal. 362; 7 Pac. Rep. 758.

11. Clear devises, when not cut down. When the words of a will, in the first instance, indicate an intent to make a clear gift, such gift is not to be cut down by any subsequent provisions which are of indefinite or undoubtful expression: *Richards v. Richards*, 36 Cal. Dec. 369, 379 (Nov. 4, 1908). A clear devise or bequest will not be cut down by other expressions or clauses contained in the will, which do not, with reasonable certainty, indicate the intention of the testator to cut down: *Lohmuller v. Mosher*, 74 Kan. 751; 87 Pac. Rep. 1140, 1141; *McNutt v. McComb*, 61 Kan. 25; 58 Pac. Rep. 965. A devise, in absolute terms, of the fee of lands, will not be cut down or limited to a less estate by the repugnant or inconsistent words of a succeeding clause of the will, unless it be the manifest intention gathered from the whole instrument that it should be done: *Boston Safe & Deposit Co. v. Stich*, 61 Kan. 474; 59 Pac. Rep. 1082, 1083. If the intention of a testator, in respect to a particular matter, is clearly expressed by the terms of his will, any subsequent expression of intention by the testator must, in order to limit the prior expression of the intention, be equally clear and intelligible, and indicate an intention to that effect with reasonable certainty: *In re Campbell's Estate*, 27 Utah, 361; 75 Pac. Rep. 851, 853. Clear and distinct provisions of a portion of a will are not revoked or destroyed by subsequent provisions, not equally clear, or by any inference or argument from other parts of the will: *Estate of Upham*, 127 Cal. 90; 59 Pac. Rep. 315, 318.

REFERENCES.

Cutting down clear devise or bequest by clauses or expressions of doubtful import: See notes 3 Am. & Eng. Ann. Cas. 615; 10 Am. & Eng. Ann. Cas. 176. Clear and distinct devise, when not affected: See note *Kerr's Cal. Cyc. Civ. Code*, § 1322. Compare *Colton v. Colton*, 127 U. S. 300; 32 L. ed. 138; 8 Sup. Ct. Rep. 1164.

12. Devises to witnesses. Under a statute requiring attestation by two witnesses, a devisee can take nothing under a will witnessed only by himself and another, for, as to such devise, there are not two competent witnesses, as required by statute, and therefore, so far as such devise is concerned, it is no will: *Clark v. Miller*, 65 Kan. 726; 68 Pac. Rep. 1071, 1072. If a will provides a pecuniary benefit for

an attesting witness, dependent upon an event which may happen, he has a beneficial interest under it, in contemplation of law; and, under the Montana statute, he is not a legally competent, attesting witness to the will. If the subsequent event, upon which the interest depends, does not happen, that fact does not relate back and restore competency: *In re Klein's Estate*, 35 Mont. 185; 88 Pac. Rep. 798, 805. But a witness to a will is not disqualified from taking a trust estate under it, where such witness has no beneficial interest in the bequest, and is merely a conduit to pass the property to the beneficiary: *Hogan v. Wyman*, 2 Or. 302, 304.

13. Invalid parts in will. The invalidity of a provision in a will, easily separable from all the other provisions of the instrument, does not affect the valid portions of the will: *Estate of Willey*, 128 Cal. 1; 60 Pac. Rep. 470, 474.

REFERENCES.

Invalid clause in will, effect of, on clauses otherwise valid: See note 3 Am. & Eng. Ann. Cas. 950.

14. Rule favoring testacy. It is a fundamental principle that a construction of a will favorable to testacy will always obtain when the language used reasonably admits of such construction: *McClellan v. Weaver*, 4 Cal. App. 593; 88 Pac. Rep. 646, 647, citing *Estate of Dunphy*, 147 Cal. 95; 81 Pac. Rep. 315.

REFERENCES.

Intestacy to be avoided: See note *Kerr's Cal. Cyc. Civ. Code*, § 1326.

15. Partial intestacy. If, in a will, there are no other apt words disposing of the property, upon the failure of a trust, intestacy as to such property must be the result: *Estate of Heberle (Cal.)*, 95 Pac. Rep. 41, 42. A will giving and bequeathing "the use and income of all of my property of which I may die possessed," etc., but containing no words as to the disposition of the fee, relates only to the 'use and income.' Under such an instrument, there having been no disposition of the residuum, the testator died intestate as to such residuum or fee: *Estate of Reinhardt*, 74 Cal. 365; 16 Pac. Rep. 13, 14. Where the testator creates a trust, void as to the real property situated within the state, it follows that, as to such property, the deceased died intestate, and the same descends by succession to his heirs at law: *Campbell-Kawannanako v. Campbell (Cal.)*, 92 Pac. Rep. 184, 196; *Estate of Walkerly*, 108 Cal. 627, 660, 752; 41 Pac. Rep. 772; 49 Am. St. Rep. 97.

REFERENCES.

Advancements, doctrine of, in cases of partial intestacy: See note 6 Am. & Eng. Ann. Cas. 1011.

16. Perpetuities. A devise and attempted trust, where the testator provides in his will for a permanent fund in trust, the income of which is to be devoted for all time to the care of his place of interment, is invalid as a perpetuity, not for a charitable use: *Estate of Gay*, 138 Cal. 552; 71 Pac. Rep. 707, 708. If a will gives and bequeaths an estate to two daughters, and provides that, upon the death of either of them, after the death of their mother, the said property shall all be and become the property of the children of the other daughter in fee, the executory devise over is not void or too remote, as the whole estate must vest absolutely within lives in being, and twenty-one years afterward, it appearing from the context of the will that its language was intended to relate to death during minority: *Buchanan v. Schulderman*, 11 Or. 150, 153; 1 Pac. Rep. 899. Where the will provided for a limitation over to the children of the testator, there being three of the testator's children living when the will was made, and the remaining child being born prior to the testator's death, and the will provided that "the fee to the proceeds of the property in question was to vest in them when the youngest child became of age"; the limitation over, and the estate sought to be conferred thereby, are not void for remoteness, and a perpetuity prohibited by law is not thereby created: *Coleman v. Coleman*, 69 Kan. 39; 76 Pac. Rep. 439. The suspension of the power of alienation, which is prohibited by the statute, is such as arises from the terms of the instrument by which the estate is created, and not such as exists outside of that instrument—as a disability of the person in whom an interest is vested, or the delay incident to procuring an order of court for the sale, or for its confirmation: *Estate of Pforr*, 144 Cal. 121, 127; 77 Pac. Rep. 825. The doctrine as to perpetuities does not apply to grants, devises, or bequests to charitable uses: *Staines v. Burton*, 17 Utah, 331; 53 Pac. Rep. 1015.

REFERENCES.

Limitation of estate upon the probate of a will as a violation of the law against perpetuities: See note 10 L. R. A. (N. S.) 564, 565. Perpetuities, effect of contemporaneous or prior interest: See note 5 Am. & Eng. Ann. Cas. 431.

17. Charitable bequests.

(1) **In general.** The rule against perpetuities is said to have no application to charitable trusts. Such trusts are not, however, exempt from the rule, barring one important exception; a gift to charity, then over to charity, forms the exception, and this is sustained upon the reasoning that, as one charitable use may be made perpetual, speaking in a general and natural sense, the gift to two in succession can be of no longer duration or of greater evil. If a gift be to charity, then over to an individual, or to an individual, then over to charity,

the rule is effective, and has perfect application: *In re John's Will*, 30 Or. 494; 47 Pac. Rep. 341, 347. In the absence of a law prohibiting the same, a public corporation may take and hold property in trust for a charitable or public purpose: *Raley v. Umatilla County*, 15 Or. 172, 176; 13 Pac. Rep. 890. A bequest for the benefit of the testator alone, to have masses celebrated for his soul, is not a charitable bequest; nor is such a bequest contrary to any provision of the law of the state of California, there being no law which declares such a bequest to be in its nature a superstitious use: *Estate of Lennon (Cal.)*, 92 Pac. Rep. 870, 871. That an alleged will is invalid and contrary to the laws of the state of California, relating to charitable uses, is not a ground for a revocation of the probate of a will. If any will falls under the inhibition of section 1313 of the Civil Code of that state, the section itself provides for the disposition of the assets of the estate, which must follow: *Estate of Lennon (Cal.)*, 92 Pac. Rep. 870, 871. "The education and preferment of orphans," is regarded as a public charity, and a devise in a will, in trust, for the founding, establishing, and forever maintaining a permanent college for such purposes is valid; and the city of Denver, in its corporate capacity, has power to accept the trust so created, and to execute it in accordance with the intention of the testator as expressed in his will: *Clayton v. Hallett*, 30 Col. 231; 70 Pac. Rep. 429, 439. A technical school, the primary and main purpose of which is to take such girls as choose to go to it, and who are fourteen years old or more, and to give them such special training as will fit them for certain vocations in life, is not an orphan asylum, within the meaning of a will bequeathing a fund to "orphan societies": *Estate of Pearson*, 125 Cal. 285; 57 Pac. Rep. 1015, 1016.

REFERENCES.

Charities, devise or bequest to churches as charitable uses: See notes 4 Am. & Eng. Ann. Cas. 1139; 9 Am. & Eng. Cas. 1202. Cy pres doctrine, general charitable intent essential to application of: See note 1 Am. & Eng. Ann. Cas. 541. Effect of specifying use of real estate, in devise to religious society: See notes 11 L. R. A. (N. S.) 509-528. Charitable bequests, limitation as to time and amount: See note *Kerr's Cal. Cyc. Civ. Code*, § 1313.

(2) **Favored by the courts.** Courts look with favor upon all attempted charitable donations, and will endeavor to carry them into effect, if it can be done consistently with the rules of law. A bequest intended as a charity is not void, and there is no authority to construe it to be legally void if by any possibility it can be made good: *Estate of Willey*, 128 Cal. 1; 60 Pac. Rep. 470, 474; 56 Pac. Rep. 550, 554; *Estate of Hinckley*, 58 Cal. 457. Charities, both as to trustees and beneficiaries, are more liberally construed than are gifts to indi-

viduals; so a gift to the trustees or managers of an orphan's home, although not constituting a corporation, is not void for uncertainty as to the beneficiary: *Estate of Upham*, 127 Cal. 90; 59 Pac. Rep. 315, 317. A devise to charity is not rendered invalid because trustees are not named, nor because a trustee incapable of taking is named. The court, in the exercise of its judicial function, will never permit a trust to fail for the want of a trustee: *Clayton v. Hallett*, 30 Col. 231; 70 Pac. Rep. 429, 434. If a gift is made for public charitable purposes, it is immaterial that the cestuis que trust are indefinite or uncertain, or that the trustee is uncertain or incapable of taking: *Wadhams v. Pennoyer*, 20 Or. 274, 279; 25 Pac. Rep. 720. In a devise for charitable uses, it is immaterial that the objects of the charity are uncertain and indefinite. Beneficiaries, as individuals, must necessarily be uncertain in a public or charitable trust: *In re Stewart's Estate*, 26 Wash. 32; 66 Pac. Rep. 148, 149. Under section 1313 of the Civil Code of California, no charitable devise or bequest can exceed one third of the estate of a decedent leaving legal heirs, and all dispositions of the property to the contrary shall be void; but it cannot be urged that such a devise or bequest is void for the reason that the amount of the estate applicable thereto is so small that it be inadequate for the purpose contemplated. Courts look with favor upon all attempts at charitable donations, and will endeavor to carry them into effect, if it can be done consistently with the rules of law; and the court has power, under the doctrine of *cy pres*, to direct the trustees of the estate to sell the undivided one-third interest, and to use the proceeds in such a manner as to carry out the intent of the testator, although not precisely in the manner he may have contemplated: *Estate of Peabody (Cal.)*, 97 Pac. Rep. 184, 186.

REFERENCES.

Charitable uses, devise to: See note 80 Am. Dec. 315.

18. **Pretermitted children.** A will, although not revoked, is rendered, as to its devises and legacies, nugatory, where a child of the testator was born after his death, and the will made no provision for either the widow or child, nor manifested any intention to disinherit the child, and where the widow, after the admission of the will to probate, renounced under the will, and elected to take under the statute: *Estate of Hobson (Col.)*, 92 Pac. Rep. 929, 930. Where a testator omitted to provide for his child or children, the law operates to give such child or children the same interest in the estate as if the father had died intestate; and the widow becomes only a tenant in common with her children in the real property belonging to the estate, all taking subject to administration, and subject to the community rights of the widow: *Estate of Grider*, 81 Cal. 571; 22 Pac. Rep. 908, 909. Under the common law, confirmed in New Mexico prior to the passage of the statutes changing the rule, a

child could be disinherited, without being mentioned in a will, unless it affirmatively appeared that the omission of his name occurred through inadvertence or mistake: *In re McMillan's Estate*, 12 N. M. 31; 71 Pac. Rep. 1083, 1084. The failure of deceased to mention his children in his will renders such will void as to such children, and oral testimony that deceased intended to omit them is inadmissible: *Morrison v. Morrison*, 25 Wash. 466; 65 Pac. Rep. 779, 781. Under the statute there must be some substantial provision for the children, of which they can legally avail themselves, or else there must be an actual naming of such children in the will, or the same will be ineffectual as against such children: *Barnes v. Barker*, 5 Wash. 390; 31 Pac. Rep. 976; *In re Barker's Estate*, 3 Wash. 390; 31 Pac. Rep. 976, 977; *Purdy v. Davis*, 13 Wash. 164; 42 Pac. Rep. 520. The statute providing that the children must be named or provided for in the will, to render the same valid, refers to some beneficial legal provision, and it is not sufficient that an absolute devise be made to another, even though the testator thought that the interest of the child would be better subserved by such devise than by one directly to him: *Purdy v. Davis*, 13 Wash. 164; 42 Pac. Rep. 520. The object of the statute providing that omitted children shall be entitled to such proportion of the estate of the testator as if he had died intestate, is to provide against any such children being disinherited through inadvertence of the testator at the time he makes his will: *Bower v. Bower*, 5 Wash. 225; 31 Pac. Rep. 598. Extrinsic proof cannot be introduced in aid of a will which omits to provide for a child in contravention of the statute: *Bower v. Bower*, 5 Wash. 225; 31 Pac. Rep. 598, 599. The intent not to provide for a child, or the issue of one, shall not be inferred from the omission to make such provision in his will, though he expressly gives all his estate to heirs or other persons named: *In re Atwood's Estate*, 14 Utah, 1; 45 Pac. Rep. 1036. Under the Utah statute, heirs, legatees, and devisees under a will are disqualified as witnesses against an omitted child: *In re Atwood's Estate*, 14 Utah, 1; 45 Pac. Rep. 1036. Where the will omits to provide for a child of the testator, the presumption is that the omission was not intentional, and in such a case the statute providing for succession by a pretermitted child applies. The presumption raised by the statute that the omission, by a testator, to provide for any of his children was not intentional, may, however, be rebutted by extrinsic evidence, whether of declarations of the testator, or collateral facts showing the intention of the testator to have been that which the language of the will expresses: *In re Atwood's Estate*, 14 Utah, 1; 45 Pac. Rep. 1036.

REFERENCES.

Effect of will upon pretermitted adopted child: See note 115 Am. St. Rep. 587. Pretermitted heir may take as child en ventre sa mere: See note 119 Am. St. Rep. 950. Rights and remedies of

omitted child: See note 115 Am. St. Rep. 580. Pretermitted children, when to succeed to estate: See note **Kerr's Cal. Cyc. Civ. Code**, § 1307.

19. After-born children. A child of a testator, born after his death, and who was not named or provided for in the will, takes under the law of descent, in all respects as if no will had been made: *Northrop v. Marquam*, 16 Or. 173; 18 Pac. Rep. 449, 457. While the will is valid and effectual as to all the children named and provided for therein, it is no will as to those not named or provided for, and any such children may take under the law of descent, in all respects as if no will had been made. This applies also to a child in ventre sa mere: *Northrop v. Marquam*, 15 Or. 173, 186. Where a child is born after the making of a will, and the testator dies, leaving such child unprovided for, the child succeeds immediately, by operation of law, as if the testator had died intestate; and all legacies and devises, whatever their character, must contribute in such a case, unless the obvious intention of the testator in relation to some particular legacy or devise would be thereby defeated, in which case all the remaining legacies and devises must contribute proportionately: *Estate of Smith*, 145 Cal. 118; 78 Pac. Rep. 369, 370.

REFERENCES.

Devises of life estates to unborn children of living persons, as contravening the rule against perpetuities: See note 6 L. R. A. (N. S.) 330-333. Admissibility of extrinsic circumstances in ascertaining intention of testator in respect to disinheriting an after-born child: See note 13 L. R. A. (N. S.) 781-782. Consult notes to the following sections of **Kerr's Cal. Cyc. Civ. Code**, as to the subjects indicated: Child in ventre sa mere, § 1339; after-born child, unprovided for, right of, to succeed, § 1306; after-born child, share of, out of what portion of estate to be paid, § 1308.

20. Adopted children. Under the Washington statutes, providing for the rights and privileges of adoption, an adopted child is entitled to all the rights and privileges of a child begotten in lawful wedlock, and such an adopted child, when omitted in a will or unprovided for therein, is entitled to the same portion of the estate of the testator, real and personal, as if he had died intestate. The same shall be assigned to him, and all the other heirs, devisees, and legatees shall refund their proportional part: *Van Brocklin v. Wood*, 38 Wash. 384; 80 Pac. Rep. 530, 531, 532.

CHAPTER III.

GENERAL PROVISIONS RELATING TO LEGACIES AND WILLS.

- § 936. Nature and designation of legacies.
- § 937. Estates chargeable.
- § 938. Order of resort to estate for debts.
- § 939. Same. For legacies.
- § 940. Same. Legacies to kindred.
- § 941. Abatement.
- § 942. Specific devise or legacy.
- § 943. Heir's conveyance good, unless will is proved within four years.
- § 944. Possession of legatees.
- § 945. Bequest of interest.
- § 946. Satisfaction.
- § 947. Legacies, when due.
- § 948. Interest.
- § 949. Construction of these rules.
- § 950. Executor according to the tenor.
- § 951. Power to appoint is invalid when.
- § 952. Executor not to act till qualified.
- § 953. Provisions as to revocations.
- § 954. Execution and construction of prior wills not affected.
- § 955. Law governing validity and interpretation of wills.
- § 956. Liability of beneficiaries for testator's obligations.

PROPERTY PASSING BY WILL. VESTING OF INTERESTS.

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| <ul style="list-style-type: none"> 1. Of devises and bequests. <ul style="list-style-type: none"> (1) In general. (2) Certain words mean what. (3) Common-law distinctions abrogated. (4) Particular description as a limitation. (5) Substitution of land for legacy. Election. (6) Executor may purchase legacy. (7) Shares of stock appurtenant to lands. (8) Devise to unnamed heirs. 2. General legacies. 3. Specific legacies. 4. Demonstrative and cumulative legacies. 5. Life estates. <ul style="list-style-type: none"> (1) In general. | <ul style="list-style-type: none"> (2) Life tenant purchasing outstanding title. (3) Power of devisee to sell. 6. Residuary legacies. <ul style="list-style-type: none"> (1) In general. (2) Intestacy as to residuum. (3) Residuary devise of life estate. (4) Where life estate is specifically bequeathed. (5) Residuum of lands under undelivered deeds. (6) Gifts when payable out of residuum. 7. Payment of legacies. Interest. <ul style="list-style-type: none"> (1) Payment of legacies. (2) Interest. (3) Bond by legatee. 8. Ademption and abatement. 9. Application of legacies to payment of debts. |
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| 10. Future interests. | (6) Election by acceptance of devise. |
| 11. Preferred legatees. | (7) Election by acts in pais. |
| 12. Creditor as legatee. | 20. Vesting and divesting of estates. |
| 13. Conditional and contingent devises. | (1) In general. |
| 14. Accumulations. | (2) As to expectancies. |
| 15. Annuities. | (3) Gifts inter vivos distinguished. |
| 16. Beneficiaries of benefit certificates. | (4) Gifts causa mortis distinguished. |
| 17. After-acquired property. | (5) Property under contract of sale. |
| 18. Community property. | (6) Property subject to trust. |
| 19. Election by widow. | (7) Deeds as affected by deeds in escrow. |
| (1) In general. | (8) Contingent remainders. |
| (2) Taking both by descent and under the will. | (9) Lapsed legacies and devises. |
| (3) Where dower right prevails. | (10) Altered circumstances. |
| (4) Effect of election. | |
| (5) Election under mistake or misapprehension. | |

§ 936. **Nature and designation of legacies.** Legacies are distinguished and designated, according to their nature, as follows:

1. A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator;

2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy;

3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy;

4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged;

5. All other legacies are general legacies. **Kerr's Cyc. Civ. Code, § 1357.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1820.

North Dakota.* Rev. Codes 1905, § 5164.

Oklahoma.* Rev. Stats. 1903, sec. 6872.

South Dakota.* Civ. Code 1904, § 1071.

Utah.* Rev. Stats. 1898, sec. 2802.

§ 937. **Estates chargeable.** When a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in this code and the Code of Civil Procedure. **Kerr's Cyc. Civ. Code, § 1358.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Civ. Code 1901, sec. 2529.

Montana.* Civ. Code, sec. 1821.

North Dakota.* Rev. Codes 1905, § 5165.

Oklahoma.* Rev. Stats. 1903, sec. 6873.

South Dakota.* Civ. Code 1904, § 1072.

Utah.* Rev. Stats. 1898, sec. 2803.

§ 938. **Order of resort to estate for debts.** The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of debts, in the following order:

1. The property which is expressly appropriated by the will for the payment of the debts;
2. Property not disposed of by the will;
3. Property which is devised or bequeathed to a residuary legatee;
4. Property which is not specifically devised or bequeathed, and,
5. All other property ratably. Before any debts are paid, the expenses of the administration, and the allowance to the family, must be paid or provided for. **Kerr's Cyc. Civ. Code, § 1359.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Civ. Code 1901, sec. 2530.

Montana.* Civ. Code, sec. 1822.

North Dakota.* Rev. Codes 1905, § 5166.

Oklahoma.* Rev. Stats. 1903, sec. 6874.

South Dakota.* Civ. Code 1904, § 1073.

Utah.* Rev. Stats. 1898, sec. 2804.

§ 939. **Same. For legacies.** The property of a testator, except as otherwise specially provided in this code and the Code of Civil Procedure, must be resorted to for the payment of legacies, in the following order:

1. The property which is expressly appropriated by the will for the payment of the legacies.
 2. Property not disposed of by the will.
 3. Property which is devised or bequeathed to a residuary legatee.
 4. Property which is specifically devised or bequeathed.
- Kerr's Cyc. Civ. Code, § 1360.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho.** Civ. Code 1901, sec. 2531.
Montana. Civ. Code, sec. 1823.
North Dakota.* Rev. Codes 1905, § 5167.
Oklahoma.* Rev. Stats. 1903, sec. 6875.
South Dakota.* Civ. Code 1904, § 1074.
Utah. Rev. Stats. 1898, sec. 2807.

§ 940. Same. Legacies to kindred. Legacies to husband, widow, or kindred of any class are chargeable only after legacies to persons not related to the testator. **Kerr's Cyc. Civ. Code, § 1361.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho.*** Civ. Code 1901, sec. 2532.
Montana.* Civ. Code, sec. 1824.
North Dakota.* Rev. Codes 1905, § 5168.
Oklahoma.* Rev. Stats. 1903, sec. 6876.
South Dakota.* Civ. Code 1904, § 1075.
Utah.* Rev. Stats. 1898, sec. 2808.

§ 941. Abatement. Abatement take place in any class only as between legacies of that class, unless a different intention is expressed in the will. **Kerr's Cyc. Civ. Code, § 1362.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1825.
North Dakota.* Rev. Codes 1905, § 5169.
Oklahoma.* Rev. Stats. 1903, sec. 6877.
South Dakota.* Civ. Code 1904, § 1076.
Utah.* Rev. Stats. 1898, sec. 2809.

§ 942. Specific devise or legacy. In a specific devise or legacy, the title passes by the will, but possession can only

be obtained from the personal representative; and he may be authorized by the superior court to sell the property devised and bequeathed in the cases herein provided. **Kerr's Cyc. Civ. Code, § 1363.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho.*** Civ. Code 1901, sec. 2533.
- Montana.*** Civ. Code, sec. 1826.
- North Dakota.*** Rev. Codes 1905, § 5170.
- Oklahoma.*** Rev. Stats. 1903, sec. 6878.
- South Dakota.*** Civ. Code 1904, § 1077.
- Utah.*** Rev. Stats. 1898, sec. 2810.

§ 943. **Heir's conveyance good, unless will is proved within four years.** The rights of a purchaser or encumbrancer of real property, in good faith and for value, derived from any person claiming the same by succession, are not impaired by any devise made by the decedent from whom succession is claimed, unless within four years after the deviser's death, the instrument containing such devise is duly proved as a will, and recorded in the office of the clerk of the superior court having jurisdiction thereof, or written notice of such devise is filed with the clerk of the county where the real property is situated. **Kerr's Cyc. Civ. Code, § 1364.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Kansas.** Gen. Stats. 1905, § 8720.
- Montana.*** Civ. Code, sec. 1827.
- North Dakota.** Rev. Codes 1905, § 5171.
- Oklahoma.** Rev. Stats. 1903, sec. 6879.
- South Dakota.** Civ. Code 1904, § 1078.
- Utah.** Rev. Stats. 1898, sec. 2811.

§ 944. **Possession of legatees.** Where specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or, if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only, and that, on his decease, it is to be delivered and to remain to the use and for the benefit of the second legatee, or to the personal representative, as the case may be. **Kerr's Cyc. Civ. Code, § 1365.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.* Civ. Code, sec. 1828.
North Dakota.* Rev. Codes 1905, § 5172.
Oklahoma.* Rev. Stats. 1903, sec. 6880.
South Dakota.* Civ. Code 1904, § 1079.
Utah.* Rev. Stats. 1898, sec. 2812.

§ 945. **Bequest of interest.** In case of a bequest of the interest or income of a certain sum or fund, the income accrues from the testator's death. **Kerr's Cyc. Civ. Code, § 1366.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.* Civ. Code, sec. 1829.
North Dakota.* Rev. Codes 1905, § 5173.
Oklahoma.* Rev. Stats. 1903, sec. 6881.
South Dakota.* Civ. Code 1904, § 1080.
Utah.* Rev. Stats. 1898, sec. 2813.

§ 946. **Satisfaction.** A legacy, or a gift in contemplation, fear, or peril of death, may be satisfied before death. **Kerr's Cyc. Civ. Code, § 1367.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.* Civ. Code, sec. 1830.
North Dakota.* Rev. Codes 1905, § 5174.
Oklahoma.* Rev. Stats. 1903, sec. 6882.
South Dakota.* Civ. Code 1904, § 1081.
Utah.* Rev. Stats. 1898, sec. 2814.

§ 947. **Legacies, when due.** Legacies are due and deliverable at the expiration of one year after the testator's decease. Annuities commence at the testator's decease. **Kerr's Cyc. Civ. Code, § 1368.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Idaho.* Civ. Code 1901, sec. 2534.
Montana.* Civ. Code, sec. 1831.
North Dakota.* Rev. Codes 1905, § 5175.
Oklahoma.* Rev. Stats. 1903, sec. 6883.
South Dakota.* Civ. Code 1904, § 1082.
Utah.* Rev. Stats. 1898, sec. 2815.

§ 948. **Interest.** Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease. **Kerr's Cyc. Civ. Code, § 1369.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1832.

North Dakota.* Rev. Codes 1905, § 5176.

Oklahoma.* Rev. Stats. 1903, sec. 6884.

South Dakota.* Civ. Code 1904, § 1083.

Utah.* Rev. Stats. 1898, sec. 2816.

§ 949. **Construction of these rules.** The four preceding sections are in all cases to be controlled by a testator's express intention. **Kerr's Cyc. Civ. Code, § 1370.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1833.

North Dakota.* Rev. Codes 1905, § 5177.

Oklahoma.* Rev. Stats. 1903, sec. 6885.

South Dakota.* Civ. Code 1904, § 1084.

Utah.* Rev. Stats. 1898, sec. 2817.

§ 950. **Executor according to the tenor.** Where it appears, by the terms of a will, that it was the intention of the testator to commit the execution thereof and the administration of his estate to any person as executor, such person, although not named executor, is entitled to letters testamentary in like manner as if he had been named executor. **Kerr's Cyc. Civ. Code, § 1371.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana. Civ. Code, sec. 1834.

New Mexico. Comp. Laws 1897, sec. 1958.

North Dakota.* Rev. Codes 1905, § 5178.

Oklahoma.* Rev. Stats. 1903, sec. 6886.

South Dakota.* Civ. Code 1904, § 1085.

Utah.* Rev. Stats. 1898, sec. 2818.

§ 951. **Power to appoint is invalid when.** An authority to an executor to appoint an executor is void. **Kerr's Cyc. Civ. Code, § 1372.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1835.
North Dakota.* Rev. Codes 1905, § 5179.
Oklahoma.* Rev. Stats. 1903, sec. 6887.
South Dakota.* Civ. Code 1904, § 1086.
Utah.* Rev. Stats. 1898, sec. 2819.

§ 952. **Executor not to act till qualified.** No person has any power, as an executor, until he qualifies, except that, before letters have been issued, he may pay funeral charges and take necessary measures for the preservation of the estate. **Kerr's Cyc. Civ. Code, § 1373.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Colorado. 3 Mills's Ann. Stats., sec. 4719.
Idaho.* Civ. Code 1901, sec. 2535.
Kansas. Gen. Stats. 1905, § 2885.
Montana.* Civ. Code, sec. 1836.
North Dakota.* Rev. Codes 1905, § 5180.
Oklahoma.* Rev. Stats. 1903, sec. 6888.
South Dakota.* Civ. Code 1904, § 1087.
Utah.* Rev. Stats. 1898, sec. 2820.

§ 953. **Provisions as to revocations.** The provisions of this title in relation to the revocation of wills apply to all wills made by any testator living at the expiration of one year from the time it takes effect. **Kerr's Cyc. Civ. Code, § 1374.**

§ 954. **Execution and construction or prior wills not affected.** The provisions of this title do not impair the validity of the execution of any will made before it takes effect, or affect the construction of any such will. **Kerr's Cyc. Civ. Code, § 1375.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1837.
Utah. Rev. Stats. 1898, sec. 2821.

§ 955. **Law governing validity and interpretation of wills.** The validity and interpretation of wills, wherever made, are

governed, when relating to property within this state, by the law of this state, except as provided in section twelve hundred and eighty-five. **Kerr's Cyc. Civ. Code, § 1376.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 150, p. 382.
Idaho. Civ. Code 1901, sec. 2536.
Montana. Civ. Code, sec. 1838.
North Dakota. Rev. Codes 1905, § 5183.
Oklahoma. Rev. Stats. 1903, sec. 6891.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5561.
South Dakota. Civ. Code 1904, § 1090.
Utah. Rev. Stats. 1898, sec. 2822.

§ 956. **Liability of beneficiaries for testator's obligations.** Those to whom property is given by will are liable for the obligations of the testator in the cases and to the extent prescribed by the Code of Civil Procedure. **Kerr's Cyc. Civ. Code, § 1377.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Montana.*** Civ. Code, sec. 1839.
North Dakota. Rev. Codes 1905, § 5184.
Oklahoma. Rev. Stats. 1903, sec. 6892.
South Dakota. Civ. Code 1904, § 1091.

PROPERTY PASSING BY WILL. VESTING OF INTERESTS.

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| <p>1. Of devises and bequests.</p> <p>(1) In general.</p> <p>(2) Certain words mean what.</p> <p>(3) Common-law distinctions abrogated.</p> <p>(4) Particular description as a limitation.</p> <p>(5) Substitution of land for legacy. Election.</p> <p>(6) Executor may purchase legacy.</p> <p>(7) Shares of stock appurtenant to lands.</p> <p>(8) Devise to unnamed heirs.</p> <p>2. General legacies.</p> <p>3. Specific legacies.</p> | <p>4. Demonstrative and cumulative legacies.</p> <p>5. Life estates.</p> <p>(1) In general.</p> <p>(2) Life tenant purchasing outstanding title.</p> <p>(3) Power of devisee to sell.</p> <p>6. Residuary legacies.</p> <p>(1) In general.</p> <p>(2) Intestacy as to residuum.</p> <p>(3) Residuary devise of life estate.</p> <p>(4) Where life estate is specifically bequeathed.</p> <p>(5) Residuum of lands under undelivered deeds.</p> |
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| (6) Gifts when payable out of residuum. | (3) Where dower right prevails. |
| 7. Payment of legacies. Interest. | (4) Effect of election. |
| (1) Payment of legacies. | (5) Election under mistake or misapprehension. |
| (2) Interest. | (6) Election by acceptance of devise. |
| (3) Bond by legatee. | (7) Election by acts in pais. |
| 8. Ademption and abatement. | 20. Vesting and divesting of estates. |
| 9. Application of legacies to payment of debts. | (1) In general. |
| 10. Future interests. | (2) As to expectancies. |
| 11. Preferred legatees. | (3) Gifts inter vivos distinguished. |
| 12. Creditor as legatee. | (4) Gifts causa mortis distinguished. |
| 13. Conditional and contingent devises. | (5) Property under contract of sale. |
| 14. Accumulations. | (6) Property subject to trust. |
| 15. Annuities. | (7) Deeds as affected by deeds in escrow. |
| 16. Beneficiaries of benefit certificates. | (8) Contingent remainders. |
| 17. After-acquired property. | (9) Lapsed legacies and devises. |
| 18. Community property. | (10) Altered circumstances. |
| 19. Election by widow. | |
| (1) In general. | |
| (2) Taking both by descent and under the will. | |

1. Of devises and bequests.

(1) *In general.* If a testator sets apart, from his estate, a certain amount of money, for his funeral expenses, proper interment of his remains, and a suitable monument to his memory, and a portion of the money is used in the erection of a granite monument at his tomb, the remainder of the bequest cannot be devoted to the maintenance of a building to be dedicated to the purposes of a free library, in memory of the deceased, as a memorial building is without the purview of such bequest: *Fancher v. Fancher*, 36 Cal. Dec. 213, 214 (Sept. 4, 1908). A decree of distribution is final and conclusive as to legacies. They should be obtained through the probate court, before distribution, and the decree is, as to them, a complete bar: *Hill v. Den*, 54 Cal. 6, 23. If an executor is held personally liable for losses arising from investments of trust funds on insufficient security, but has title to the property taken as such security, the legatee must quitclaim to him as a condition precedent to his paying such losses: *In re Roach's Estate (Or.)*, 92 Pac. Rep. 118, 127. It is a rule that a condition or direction imposed on a devisee to pay a sum of money enlarges the devise to him, without words of limitation, into an absolute estate in fee: *Donohue v. Donohue*, 54 Kan. 136; 37 Pac. Rep. 998, 999. The presentation of a claim against an estate of a deceased person does not estop such claimant from claiming as a legatee under the will of the deceased, by which it was clearly the

intention of the testator to make a gift to the legatee, and to require its payment before any distribution had to residuary devisees or legatees: *Estate of Barclay*, 152 Cal. 753; 93 Pac. Rep. 1012, 1014.

REFERENCES.

Advancements to heirs, doctrine of: See notes 12 L. R. A. 566-570. Bequests to class as including persons dead before making of will: See note 5 Am. & Eng. Ann. Cas. 243. Capacity of corporation to take by will: See note 2 Prob. Rep. Ann. 674-679, and notes 18 Am. Dec. 541; 80 Am. Dec. 315. Corporations, devise to: See notes 18 Am. Dec. 541; 80 Am. Dec. 315. Right to question power of corporation to take by will property in excess of its charter authority: See note 9 L. R. A. (N. S.) 689, 690. Right to contest power of corporation to take or hold property: See notes 32 L. R. A. 293-297; 60 Am. St. Rep. 318, 321. Construction, validity, and effect of devises and legacies: See notes 2 L. R. A. 175-177; 10 L. R. A. 816-818; 11 L. R. A. 185. Lands, profits, income, etc., of land, estate passing by devise of: See note 9 Am. & Eng. Ann. Cas. 247. Municipal corporations as legatees or devisees: See note 4 Prob. Rep. Ann. 113-116. Consult notes to the following sections of *Kerr's Cal. Cyc. Civ. Code* as to the matters indicated: Legacies controlled by testator's intention, § 1370; legacies, specific, demonstrative, annuities, residuary, and general, § 1357; capacity to take by will, § 1275; power to devise, how executed under the will, § 1330; land, devises of, how construed, § 1311; witness as devisee, when gift to, void, §§ 1282, 1283; devise or bequest of all real or personal property, or both, what passes by, § 1331; class, devise or bequest to, § 1337. Succession and distribution of property of intestates: See note *Kerr's Cal. Cyc. Civ. Code* (*Kerr's Stats. and Amdts.*, p. 424), § 1386.

(2) **Certain words mean what.** While the terms "legacy" and "bequest" refer to gifts by will of personal estate, they are not always employed according to their technical meaning, and are not always to be so construed: *Logan v. Logan*, 11 Col. 44; 17 Pac. Rep. 99, 100. Use of the words "bequest," "legacy," "bequeath," "devise": See *In re Campbell's Estate*, 27 Utah, 361; 75 Pac. Rep. 851, 853. The word "legacy" is used to denote a gift by will of personalty in general: *In re Campbell's Estate*, 27 Utah, 361; 75 Pac. Rep. 851, 853. A devise of the "absolute use and control of the rest and residue of my property," to the wife, "for her comfort and support," etc., held to be a devise for the "use" and not for the consumption of the money or other property covered by the bequest: *Leahy v. Cardwell*, 14 Or. 171, 173; 12 Pac. Rep. 307. Devises, not grammatically connected, nor united by the expression of a common purpose, must be construed separately, and without relation to each other, or to the words of limitation which follow. Hence, in a will

loosely drawn, the words "to have and hold during her natural life" have been held to qualify only the last preceding gift of devise or bequest: *Boston Safe etc. Co. v. Stich*, 61 Kan. 474; 59 Pac. Rep. 1082, 1083.

REFERENCES.

"Estate" when testamentary gift is to be restricted to personalty: See note 3 Am. & Eng. Ann. Cas. 420. Devise of fee in lands, words which will pass: See note *Kerr's Cal. Cyc. Civ. Code*, § 1329.

(3) **Common-law distinctions abrogated.** Section 1332 of the California Civil Code abrogates the rule of the common law, which made a distinction between devises of real property and bequests of personal property; the former, speaking from the death of the testator, and the latter, from the date of the will. It is the accepted rule in this state that, where there is a valid general residuary devise, real property mentioned in a lapsed or void devise, goes to the residuary devisee, and not to the heirs, unless a contrary intent is clearly expressed by the terms of the will: *Estate of Russell*, 150 Cal. 604; 89 Pac. Rep. 345; *Estate of Upham*, 107 Cal. 90; 59 Pac. Rep. 315; *O'Connor v. Murphy*, 147 Cal. 148; 81 Pac. Rep. 406.

(4) **Particular description as a limitation.** A particular description in a will of real property, owned by the testator at the time of the execution of the will, which follows a general devise of all real and personal property, is not intended as a limitation upon the preceding grant, and such will disposes of all of the real estate of which the testator died seised: *Durboraw v. Durboraw*, 67 Kan. 139; 72 Pac. Rep. 566, 567.

(5) **Substitution of land for legacy. Election.** If a person is authorized by will to substitute for legacies certain land of the value of such legacies, or to invest the money for the legatees in lands of that value, he should exercise his election within a reasonable time. He is not ordinarily entitled to wait until a final distribution of the estate before making such election: *Dunne v. Dunne*, 66 Cal. 157; 4 Pac. Rep. 441, 443, 1152.

REFERENCES.

Conversion of real property into money, effect of, when directed to be made by the will: See note *Kerr's Cal. Cyc. Civ. Code*, § 1338.

(6) **Executor may purchase legacy.** The Oregon statute prohibits the administrator of an estate from purchasing the property of the estate at his own sale; but such statute does not prohibit the administrator from purchasing a legacy bequeathed by the deceased, where

the transaction appears to be fair, and is grounded upon an adequate consideration: *Lombard v. Carter*, 36 Or. 266; 59 Pac. Rep. 473.

(7) **Shares of stock appurtenant to lands.** By a decree of distribution, there was distributed as appurtenant to land devised, certain shares of stock in a water company, which company provided water for irrigating the lands; held, that the stock was appurtenant, as a right to so much water, to the land, and consequently, devisable as real property: *Estate of Thomas*, 147 Cal. 236; 81 Pac. Rep. 539, 541.

(8) **Devise to unnamed heirs.** As a general rule, under a devise to heirs, without naming them, which therefore necessarily compels a reference to the statute of distribution to ascertain who shall take under the will, the devisees will take in the proportion prescribed by the statute, and, if not of equal degree, they will take, in the absence of a direction in the will to the contrary, or in case the intention of the testator is in doubt, by right of representation, or per stirpes, and not per capita. But when the testator prescribes the mode of distribution, there is no room for presumption, and it must be made as he directs: *Ramsey v. Stephenson*, 34 Or. 408; 56 Pac. Rep. 520.

REFERENCES.

Gifts by will designating no donee: See note 80 Am. Dec. 314.

2. **General legacies.** A general legacy is one which is payable out of the general assets of a testator's estate, such as a gift of money or other thing in quantity, and not in any way separated or distinguished from the other things of like kind: *Nusly v. Curtiss*, 36 Col. 464; 85 Pac. Rep. 846, 847. See *Estate of Woodworth*, 31 Cal. 595, 602. Whether a testamentary gift is specific or general, is to be determined by the same tests, where the subject of the gift is real, as where it is personal, property: *Estate of Painter*, 150 Cal. 498; 89 Pac. Rep. 98, 100. A bequest or a devise of the residue of an estate is general, where such residue is not ascertainable at the time the will is made: *Estate of Painter*, 150 Cal. 498; 89 Pac. Rep. 98, 100.

REFERENCES.

Is bequest of stocks, bonds, or notes general or specific: See note 11 L. R. A. (N. S.) 49-87.

3. **Specific legacies.** A specific legacy is a gift by will of a specific article, or a particular part of the testator's estate, which is identified and distinguished from all others of the same nature, and which is to be satisfied only by the delivery and receipt of the particular thing given: *Nusly v. Curtiss*, 36 Col. 464; 85 Pac. Rep. 846,

847. See definitions in *Estate of Woodworth*, 31 Cal. 595, 601; *In re Campbell's Estate*, 27 Utah, 361; 75 Pac. Rep. 851, 853. A specific legacy is a bequest of a particular or specified article of personal property distinguished from all other articles of personal property belonging to the testator. Instances of specific legacies given, and the terms of a legacy stated, which do not bring it within the foregoing definition: *Adair v. Adair*, 11 N. D. 175; 90 N. W. Rep. 804. Where the description of a bequest is particular enough to identify the subject-matter of the testamentary gift and to evince the testator's intention to vest the title in the trustees named, the bequest is specific, and the property is exonerated from liability on account of the debts of decedent until a resort thereto becomes necessary by reason of a failure to discharge obligations of the estate from the proceeds of the sales of the remaining property, not specifically devised or bequeathed: *In re Noon's Estate (Or.)*, 88 Pac. Rep. 673. A devise of a conditional life estate in a homestead, is a special bequest, and cannot be taken into account in adjusting matters in proceedings for an accounting as to moneys alleged to belong to the estate: *Haines v. Christy*, 28 Col. 502; 66 Pac. Rep. 883, 887. Where bank stock has been bequeathed, and is to be sold by the executors, and the proceeds divided among the legatees named, the legacies are not merely demonstrative,—they are specific; and legacies given by a codicil to the will are not "advancements": *Estate of Zeile*, 74 Cal. 125, 130; 15 Pac. Rep. 455. Where the testator gave and bequeathed "the sum of five hundred dollars and all other personal property of which I may die possessed," this did not carry a bequest of all the moneys of the estate over the sum of five hundred dollars: *Estate of Smith*, 6 Cal. App. Dec. 81, 83 (Jan. 2, 1908). Where the language used indicates the intention to make two distinct gifts, one of specific property, and the other of the residue, a specific legacy or devise is not rendered general by the fact that there is a gift of the residue to the same person: *Estate of Painter*, 150 Cal. 498; 89 Pac. Rep. 98, 100.

REFERENCES.

Consult notes to the following sections of *Kerr's Cal. Cyc. Civ. Code*, as to the matters indicated: Bequest of interest or income of a certain fund, income accrues thereon from testator's death, § 1366; specific legacies for life, delivery of inventory of property to second legatee, § 1365; title to specific devises and legacies passes by will, possession only in personal representative, § 1363.

4. Demonstrative and cumulative legacies. A demonstrative legacy partakes both of the nature of a general and specific legacy. It is a gift of money or other property charged on a particular fund in such a way as not to amount to a gift of the corpus of the fund or evince an intent to relieve the general estate from liability in

case the fund fails: *Nusly v. Curtiss*, 36 Col. 464; 85 Pac. Rep. 846, 847. Where a testator gives a legacy of quantity, simpliciter, and also a second legacy of quantity to the same legatee, the second legacy is regarded as cumulative, and not as substitutionary, unless the language of the second will or codicil shows an intent to the contrary: *Estate of Zeile*, 74 Cal. 125, 131; 15 Pac. Rep. 455.

5. Life estates.

(1) **In general.** Where a life estate is fixed in the will upon an event that is bound to happen in the course of time, the life estate and the remainder, vest at the death of the testator in the legal heirs, and the title in the remainder is not held in abeyance until the determination of the life estate,—the words of the will creating such vested life estate and vested remainder being, after creating the life estate, the property then, “to descend to my legal heirs”: *Bunting v. Speck*, 41 Kan. 424; 21 Pac. Rep. 288, 294. Where a will contained the provision: “I wish my wife to have all my property of every kind that I may own at my death, to have for her own use and benefit while she may live,” with a disposition of all property that might be left by her at her death; the widow takes a life estate, with power to convert in fee: *Greenwalt v. Keller*, 75 Kan. 578; 90 Pac. Rep. 233, 234. Under a devise in a will by which the wife is to hold the property “during her life, or while she shall remain unmarried, and that at her death or marriage, it shall descend in equal proportions to the testator's children,” etc., the devise is a clear manifestation of the intention to limit the estate given the widow to her natural life, with the remainder over to her heirs: *Winchester v. Hoover*, 42 Or. 310; 70 Pac. Rep. 1035, 1036. Where the testator in his will provides as follows: “I give to my wife, all my real and personal property for her use and benefit as long as she lives, then to be divided as follows,” etc.; the wife is given only a life interest in such property, and is, therefore, entitled only to the income or use of the same during her lifetime: *Chase v. Howie*, 64 Kan. 320; 67 Pac. Rep. 822, 823.

(2) **Life tenant purchasing outstanding title.** Where a life tenant and executrix of the estate in full possession, purchases the outstanding title, which she afterward declared was negotiated as an individual investment, intending thereby to become the absolute owner thereof, unincumbered by any trust obligations; where the equities as to the value of the property, and the amount paid, are strongly against her contention; and where it appears that the original intention was that the purchase was to be for the benefit of the devisees under the will, the purchaser ought to be regarded as holding the legal title to said premises in trust for the beneficiaries under said will, and no claim for the value of improvements placed upon the

property, under such circumstances, can be allowed: *Moore v. Simonson*, 27 Or. 117; 39 Pac. Rep. 1105.

(3) **Power of devisee to sell.** Where the only devise of property is of a life estate, the power of disposition in the devisee is limited to such as a life tenant only may exercise. If the will gives no power to such devisee to sell or dispose of the fee, none can be inferred from the necessities of the case: *Winchester v. Hoover*, 42 Or. 310; 70 Pac. Rep. 1035, 1037.

REFERENCES.

Devise over of life estate with power of disposition, validity and effect of: See note 7 Am. & Eng. Ann. Cas. 953.

6. Residuary legacies.

(1) **In general.** No particular mode of expression is necessary to constitute a residuary legatee. It is sufficient, if the intention of the testator is plainly expressed, that the surplus of the estate, after payment of debts and legacies, shall be taken by a person designated: *Estate of Upham*, 127 Cal. 90; 59 Pac. Rep. 315, 317. Where, by a will written in the Spanish language, the testator made a bequest in terms, which, translated into English, meant, "and everything in the house at that time," such bequest includes moneys which were in a safe in the house: *Perea v. Barela*, 6 N. M. 239, sub nom. *Garcia y Perea v. Barela*, 27 Pac. Rep. 507, 510. Where the mother of a testator is the sole surviving heir, under the laws of succession, such heir takes all the inheritable property of the estate, notwithstanding a provision in the testator's will, after making a specific bequest to his mother, "that she shall not have any further part of my estate in line of succession or otherwise." Such declaration must be regarded as nugatory, unless the estate which the law gives to the parent is in terms disposed of to some one else: *Andrews v. Harron*, 59 Kan. 771; 51 Pac. Rep. 885. An unequivocal, direct, and positive devise of an absolute estate is not to be restricted by ambiguous and uncertain provisions following in the will, and this applies to a devise of the residuary interest in the estate: *Reeves v. School District*, 24 Wash. 282; 64 Pac. Rep. 752, 753. Section 1452 of the Code of Civil Procedure of California, providing that the heirs or devisees may maintain an action for the recovery of the real estate against anyone except the administrator or executor, cannot be considered as applying to a remainderman, although he may have received his estate through a devise, and, therefore, is literally, in the general category of "devisees." That section means only those heirs and devisees who have a present right of possession, and, therefore, a present cause of action, as against everyone except the administrator. Therefore, such a statute could not run against a remainderman during the life of a particular tenant: *Pryor v.*

Winter, 147 Cal. 554; 82 Pac. Rep. 202, 203. A residuary legacy embraces only that which remains after all the other bequests of the will are discharged. There can be but one such residuum: Estate of Williams, 112 Cal. 521, 526; 53 Am. St. Rep. 224; 44 Pac. Rep. 808. An action by a residuary legatee to set aside a sale of real property made by the executors, or for damages, cannot be maintained where the evidence fails to show such an inadequacy of consideration as would raise the presumption of fraud, or a want of judgment and discretion on the part of the executors: Sharp v. Greene, 22 Wash. 677; 62 Pac. Rep. 147, 152.

REFERENCES.

Predeceased child, right of representative of, to share in remainder given to children as a class: See note 2 Am. & Eng. Ann. Cas. 645. Residuary clauses in a will: See note Kerr's Cal. Cyc. Civ. Code, §§ 1332, 1333. Revocation of testamentary gift of particular estate or interest as revocation of remainder or limitation over: See note 5 Am. & Eng. Ann. Cas. 789.

(2) **Intestacy as to residuum.** The presumption that a testator intended to make a disposition in the will executed, of his entire estate, is not conclusive; for it might happen that a person may desire to make a definite disposition of a portion of his estate, and be willing to leave the disposition of the remainder to the direction of the law: Taylor v. Horst, 23 Wash. 446; 63 Pac. Rep. 231, 232. A presumption exists that the testator devises his whole estate when he makes his will; but it is equally necessary that the person to whom the estate is devised should be indicated. Where, therefore, it cannot be determined from the will as to who shall take the residue, the testator must be regarded as having died intestate as to such residue, and the same will be distributed according to the law of descent: Cross v. Cross, 23 Wash. 673; 63 Pac. Rep. 528, 529.

(3) **Residuary devise of life estate.** A residuary devise of a life estate by a testator to his wife, "to have and to use and to dispose of during her natural life, and after her death to be divided equally among my three youngest heirs, namely," etc., gives the wife authority to convey the fee, and the part undisposed of descends to the children in accordance with the will: Ernst v. Foster, 58 Kan. 438; 49 Pac. Rep. 527, 529. Where a testator devises a beneficial interest in the residue of his estate to his wife during her life, and attempts to create a trust, it is immaterial, so far as concerns the remaining heirs, whether or not a valid trust was created, if, notwithstanding its invalidity, there was such a disposition of the property made to the wife as should be upheld under the settled principles of testamentary construction: McClellan v. Weaver, 4 Cal. App. 593; 88 Pac. Rep. 646.

(4) **Where life estate is specifically bequeathed.** In the absence of anything showing a contrary intention on the part of the testator, a residuary clause in the will will carry the fee of lands in which a life estate is specifically devised: *Sullivan v. Larkin*, 60 Kan. 545; 57 Pac. Rep. 105, 106.

(5) **Residuum of lands under undelivered deeds.** Where deeds have been made by the testator but not delivered, no title to the lands mentioned therein passes thereby, and the lands remain a part of his estate, and are properly included in the residue of the estate devised by the will: *Ostrom v. DeYoe*, 4 Cal. App. 326; 87 Pac. Rep. 811, 813.

(6) **Gifts when payable out of residuum.** Where the intent of the testator is clear that a gift which he makes should not be chargeable upon any particular fund or property, the legacy should be satisfied out of whatever residue there shall be in the estate, and it is error for the court to hold that the legacy must fail because, under the will, "it was to be a charge on the personal property alone," all such personal property having been exhausted by the payment of the expenses of administration, family allowance, etc.: *Estate of Ratto*, 149 Cal. 552; 86 Pac. Rep. 1107, 1108.

7. Payment of legacies. Interest.

(1) **Payment of legacies.** Legacies are due and deliverable after the expiration of one year from the testator's decease, even where administration has been prevented by contests of the will, or in regard to the right to administer: *Estate of Williams*, 112 Cal. 521, 525; 53 Am. St. Rep. 224; 44 Pac. Rep. 808. If a legacy falls due, the probate court can order the personal representative to pay it. This may also be done upon notice: *Toland v. Earl*, 129 Cal. 148, 152; 79 Am. St. Rep. 100; 61 Pac. Rep. 910; *Estate of Dunne*, 65 Cal. 378; 4 Pac. Rep. 379. The court does not err in directing the payment of a legacy where the executors have in their hands a sum of money much in excess of such legacy, although a suit is pending as to a rejected claim of another person against the estate: *Estate of Chesney*, 1 Cal. App. 30, 33; 81 Pac. Rep. 679. In determining the amount of money in the hands of executors available for the immediate payment of a legacy, the court is not required to take into consideration the amount that may be necessary for the erection of a tombstone provided for by the will: *Estate of Chesney*, 1 Cal. App. 30; 81 Pac. Rep. 679, 680. The personal representative has no right to object to paying legatees on the ground that they have forfeited their right to the legacies, because of an alleged violation of a provision in the will. That is a question in which he has no interest. It concerns only the rights of the residuary devisees: *Estate of*

Murphy, 145 Cal. 464; 78 Pac. Rep. 960, 961. A will containing the following provision: "I request him (the executor), to invest the sum of \$1,000 in some satisfactory security and transfer the same to the Ventura lodge," etc., cannot be made the basis of an action by the donee to compel the executor to convey to said lodge the sum mentioned in the will, as there is no warrant, under such a bequest, for an unconditional money judgment: *Kauffman v. Greis*, 141 Cal. 295; 74 Pac. Rep. 846, 848. A devisee who accepts a devise charged with the payment of legacies, becomes personally answerable therefor: *Dunne v. Dunne*, 66 Cal. 157; 4 Pac. Rep. 441, 1152. Under a clause in a will providing that a portion of the property is to be paid to children, upon attaining their majority, such children cannot receive their portion before the time fixed in the will, and until they arrive of age, the executors of the will must have charge of their interests, carefully keeping the moneys of the estate under the direction of the court: *Morse v. Macrum*, 22 Or. 229; 29 Pac. Rep. 615. While the language of subdivision 4 of section 1360 of the California Civil Code, providing for the order of payments out of the property of the estate, is doubtful in its meaning, it has been held that specific legacies or devises are not chargeable thereunder with the payment of general legacies: *Estate of Painter*, 150 Cal. 498; 89 Pac. Rep. 98, 100; *Estate of Neistrath*, 66 Cal. 303; 5 Pac. Rep. 507.

REFERENCES.

Order of resort to property of testator for payment of legacies: See note *Kerr's Cal. Cyc. Civ. Code*, §§ 1360, 1361; legacies, when due and deliverable: See note *Kerr's Cal. Cyc. Civ. Code*, § 1368.

(2) **Interest.** Legacies bear interest from the time they are due and payable: *Estate of Williams*, 112 Cal. 521, 525; 53 Am. St. Rep. 224; 44 Pac. Rep. 808. Interest allowed on particular legacies always comes from the residuum, and when the money is retained by the estate, its use is presumably to the advantage of the residuary: *Estate of Williams*, 112 Cal. 521, 526; 53 Am. St. Rep. 224; 44 Pac. Rep. 808. If a testator directs a legatee to be paid out "of the first moneys realized from my estate, when the amount of the legacy shall come into their hands," after the "payment of all my just debts and funeral expenses," it is clearly the testator's express intention that the legacy shall not become due and payable until after all his debts and funeral expenses have been paid. It does not therefore bear interest until after such payment: *Estate of James*, 65 Cal. 25; 2 Pac. Rep. 494. There is no such thing as interest upon a residuary legacy, for there can be no fund from which the interest could be paid: *Estate of Williams*, 112 Cal. 521, 526; 53 Am. St. Rep. 224; 44 Pac. Rep. 808.

REFERENCES.

Interest upon legacies: See note *Kerr's Cal. Cyc. Civ. Code*, § 1369.

(3) **Bond by legatee.** The court may order the payment of a legacy without exacting a bond from the legatee, if the estate "is but little indebted," and the court is satisfied that no injury can result to the estate: *Estate of Chesney*, 1 Cal. App. 30; 81 Pac. Rep. 679, 680. The purpose of a bond given by a legatee for the payment of his proportion of the debts is principally to secure the estate against contested claims, or claims which may come in after the order is made: *Estate of Dunne*, 65 Cal. 378, 380; 4 Pac. Rep. 379.

8. **Ademption and abatement.** A specific bequest is subject to ademption, but such is not true of a general, or a demonstrative, legacy: *Nusly v. Curtiss*, 36 Col. 464; 85 Pac. Rep. 846, 847. A bequest of the proceeds of a life-insurance policy is a specific bequest, and where the testator collected such proceeds and mingled the funds with his own, generally, it constitutes an ademption of the legacy: *Nusly v. Curtiss*, 36 Col. 464; 85 Pac. Rep. 846, 847.

REFERENCES.

Advancements or gifts, when not taken as ademptions of general legacies: See note *Kerr's Cal. Cyc. Civ. Code*, § 1351. Ademption of legacies: See notes 37 Am. Dec. 667-671; 95 Am. St. Rep. 342-370. Abatement of legacies in any one class: See note *Kerr's Cal. Cyc. Civ. Code*, § 1362.

9. **Application of legacies to payment of debts.** If a special bequest is applied to the payment of a debt, and there are other legatees, the remedy of the legatees whose bequest is so applied, is to seek contribution from the others: *Estate of Moulton*, 48 Cal. 191, 192. Specific legacies and specific devises stand upon the same footing with respect to the payment of debts, and neither is to be charged until the remainder of the estate, both real and personal, is exhausted: *Estate of Woodworth*, 31 Cal. 595, 611. If a legatee assigns his interest in the estate, as security for a debt, the assignee thereof is entitled, on distribution of the estate, to the payment of his debt out of the legacy so assigned: *Estate of Phillips*, 71 Cal. 285; 12 Pac. Rep. 169, 171.

REFERENCES.

Order of abatement to pay debts, as between demonstrative legacies and specific legacies or devises: See notes 4 L. R. A. (N. S.) 922, 923. Abatement of legacies in case of deficiency of assets: See note 8 Am. St. Rep. 720-726. Consult notes to the following sections of *Kerr's Cal. Cyc. Civ. Code*, as to the matters indicated: Order of resort to estate for debts, § 1359; provision by will for payment of debts, effect of, when insufficient, § 1562; entire estate of intestate chargeable with debts, except when otherwise provided, § 1358; contribution among legatees, § 1564; liability of beneficiaries for testator's obligations, § 1377.

10. **Future interests.** A vested future interest in fee derived under a will, will pass by grant, devise, or succession, and the devisee may alienate it at his pleasure. If he should die before distribution, without such alienation, it will vest in his heirs, devisees, or legatees: *Williams v. Williams*, 73 Cal. 99; 14 Pac. Rep. 394, 396.

11. **Preferred legatees.** Where a testator bequeathed all his property to his wife, "she to pay the bequests following;" (after which the bequests were designated), and where the testator further provided that the share of the wife be not less "than \$7,000, inclusive of the \$3,000 policy on my life in the Royal Arcanum and another \$2,000 policy on my life in the Ancient Order of the United Workmen, payable now to her," the language quoted indicates that the testator's wife should be a preferred legatee to the sum of \$2,000 to be paid out of his estate, it being the evident intent of the testator that his wife should be worth the sum of \$7,000,—\$5,000 of her own by policies, and \$2,000 from his estate: *In re Phillip's Estate*, 18 Mont. 311; 45 Pac. Rep. 222.

12. **Creditor as legatee.** Where there is nothing in the language of a will which puts a legatee to the necessity of abandoning his rights as a creditor for such amounts as are not barred by the statute of limitations, he is not estopped to claim as an ordinary creditor: *Estate of Barclay*, 152 Cal. 753; 93 Pac. Rep. 1012, 1014.

13. **Conditional and contingent devises.** A certain sum bequeathed and to be paid "after the payment of debts and funeral expenses," does not become due and deliverable at the expiration of one year after the testator's decease, and consequently, it is error to allow interest thereon after the expiration of that period. Such a legacy becomes due and payable after the debts and funeral expenses are paid, and not otherwise: *Estate of James*, 65 Cal. 25; 2 Pac. Rep. 494. Where a testatrix, in making bequests to her daughter, provides that the same, "shall take effect" in "the event of my said daughter becoming a widow, or otherwise becoming lawfully separated from her husband," there is nothing in the condition referred to that can be against public policy, as holding out an inducement to a daughter to live separate or apart from her husband. It cannot be said that a condition attaching to a legacy is against public policy where such condition tends to induce a legatee to do a lawful act in a lawful way: *Born v. Hortsman*, 80 Cal. 452; 22 Pac. Rep. 338, 339. Provisions in a codicil that the dividends on corporation stock bequeathed, shall be divided among the testator's heirs at law, "who under my said will would be entitled thereto," constitute, in the light of the attending circumstances, a bequest of the profits, burdened with an obligation to pay the debts of the decedent's estate: *In re Noon's Estate (Or.)*, 88 Pac. Rep. 673, 677.

REFERENCES.

Condition precedent in a will: See note **Kerr's Cal. Cyc. Civ. Code**, §§ 1346, 1347, 1348. Conditional estate, words merely declaratory of purpose or consideration of devise as creating: See note 3 *Am. & Eng. Ann. Cas.* 38. Condition subsequent in a will: See note **Kerr's Cal. Cyc. Civ. Code**, § 1349, and notes 70 *Am. St. Rep.* 83; 31 *L. R. A.* 432, 837; 9 *L. R. A.* 165, 573. Conditional devises and bequests: See note **Kerr's Cal. Cyc. Civ. Code**, § 1345. Contingent or conditional will: See notes 8 *Am. & Eng. Ann. Cas.* § 1150; **Kerr's Cal. Cyc. Civ. Code**, §§ 1281, 1345-1349.

14. Accumulations. Where provision is made in a will for accumulations, one for an older child, and another for a younger child, the provision for such accumulations, being for their sole benefit, cannot, by any possibility, suspend the absolute power of alienation for a longer period than during the lives of such children. If the older child die before the specified time, the trust for accumulation for his benefit at once determines for lack of a beneficiary, and the property already accumulated immediately vests in his heirs. The same is true as to the younger child. In neither case, can the trust for accumulations continue longer than during the life of the designated beneficiary in being at the time of the creation of the trust: *Estate of Haine*, 150 *Cal.* 640; 89 *Pac. Rep.* 606, 607; *Estate of Hendy*, 118 *Cal.* 656; 50 *Pac. Rep.* 753; *Estate of Stevie*, 124 *Cal.* 533, 539; 57 *Pac. Rep.* 564.

15. Annuities. The bequest of an amount to be paid monthly is not an annuity where the amount is not certain: *Estate of Brown*, 143 *Cal.* 450; 77 *Pac. Rep.* 160, 162.

REFERENCES.

Annuities commence at the testator's decease: See note **Kerr's Cal. Cyc. Civ. Code**, § 1368.

16. Beneficiaries of benefit certificates. The beneficiaries, under a benefit certificate payable to the legal heirs of the insured, take by virtue of the contract, and not by succession, even though the will expressly gives, devises, and bequeaths the moneys that shall be collected thereunder: *Burke v. Modern Workmen*, 2 *Cal. App.* 611; 84 *Pac. Rep.* 275, 276. The beneficiary named in a mutual benefit certificate has no property or interest therein that his heirs may succeed to. The interest is a mere expectancy of an incomplete gift, is revocable at the will of the insured, and does not ripen until his death: *Supreme Council etc. Legion of Honor v. Gehrenbeck*, 124 *Cal.* 43; 56 *Pac. Rep.* 640.

17. After-acquired property. The rule of the common law, that after-acquired real estate did not pass by will, does not now obtain in California, where the rule was early changed by statute: *Estate of Hopper*, 66 Cal. 80; 4 Pac. Rep. 984, 985. Under the common law, a will did not affect after-acquired real estate, but this rule has been generally changed by statute, and in most of the states where legislation has been had upon the subject, all property owned by the testator at the time of his death is devised by his last will whenever made: *Johnson v. White* (Kan.), 90 Pac. Rep. 810, 812; *Durboraw v. Durboraw*, 67 Kan. 139; 72 Pac. Rep. 566, 567. The intention to devise after-acquired property is sufficiently shown by the language, "I give, devise, and bequeath all my real and personal estate, of whatsoever nature or kind soever, and wheresoever situated," etc., and "all the rest, residue, and remainder of my estate, real, personal, and mixed, and wheresoever situated": *Clayton v. Hallett*, 30 Col. 231; 70 Pac. Rep. 429, 433.

REFERENCES.

After-acquired property, wills pass estate to: See note **Kerr's Cal. Cyc. Civ. Code**, § 1312.

18. Community property. The testator has no power to authorize a sale of his wife's interest in the community property, except for payment of debts: *Sharp v. Loupe*, 120 Cal. 89, 92; 52 Pac. Rep. 134, 586; *Estate of Wickersham* (Cal.), 70 Pac. Rep. 1079. The widow is not estopped from asserting her title to her community interest by accepting a beneficial interest under the will: *Beard v. Knox*, 5 Cal. 252, 257; *Estate of Silvy*, 42 Cal. 210, 212; *Estate of Gwin*, 77 Cal. 313; 19 Pac. Rep. 527, 528. Where the words "common property" are not used in a will, in their technical sense, such words are given their commonly accepted meaning; but a devise of common property, when there is no such property, does not convey separate property: *Estate of Reinhardt*, 74 Cal. 365; 16 Pac. Rep. 1314. The wife's interest in the community property is adversely affected by a sale of the community property under a power to sell in the will: *Estate of Wickersham* (Cal.), 70 Pac. Rep. 1079. Where the will is susceptible of two possible constructions,—one, that the testator intended to devise all property of which he should be possessed at the last moment of life, including the whole of the community property, over which he had the power of disposition during life; and the other, that he intended to devise only his property then in his possession, over which alone he had power of testamentary disposition,—the rules of construction and presumptions of law require the adoption of the latter construction: *Estate of Gilmore*, 81 Cal. 240; 22 Pac. Rep. 655, 656.

19. Election by widow.

(1) **In general.** The deceased may so frame his will that his widow cannot have the benefits given her by statute, and she will then be put to her election as to which she will take. But when she repudiates the will, she is entitled to the benefit of her statutory rights as fully and completely as if there had been no will: *Estate of Bump* (Cal.), 92 Pac. Rep. 643; *Estate of Lufkin*, 131 Cal. 293; 63 Pac. Rep. 469. An election of a widow not to take under the will is in no sense a contest of the will or of its probate; and, where the widow was named as executrix, caused the will to be probated, and was appointed and qualified as such executrix, she is not estopped to make such election after the expiration of the time fixed by the law in which a contest may be entered: *Estate of Gwin*, 77 Cal. 313; 19 Pac. Rep. 527, 528. A widow is not estopped to make her election to take under the law by causing the will to be probated and becoming the executrix thereof: *Estate of Frey*, 52 Cal. 658. Under the Utah statute, where the estate is solvent, the wife, upon declining to accept under the provisions of the will, and making her election, is entitled to one third of all the legal and equitable real property, but not to a one third of the personal property, or homestead right: *In re Little's Estate*, 22 Utah, 204; 61 Pac. Rep. 899, 900. Where a statute points out the course to be pursued by a widow in relation to the probate of the will, and her election to take thereunder, a substantial compliance therewith must be had in order to make an election to take under the will binding. The law provides, where she fails to make her election to take under the will, that she shall take such share of the husband's estate as she would have been entitled to had he died intestate: *James v. Dunstan*, 38 Kan. 289; 16 Pac. Rep. 459, 461. The Kansas statute, relating to the election, by a widow, to accept the provisions of her husband's will, or to take what she is entitled to under the law of descents and distributions, applies also to a husband for whom provision is made by the will of his deceased wife. The statute reads: "If no provision be made for a widow in the will of her husband, and she shall not have consented thereto in writing, it shall be the duty of the probate court forthwith after the probate of such will, to issue a citation to said widow to appear and make her election, whether she will accept such provision or take what she is entitled to under the provisions of the law concerning descents and distribution, and said election shall be made within thirty days after the service of the citation aforesaid; but she shall not be entitled to both": *Moore v. Herd* (Kan.), 93 Pac. Rep. 157. The consent of the wife, to take under the will, is not required to be executed, under the Kansas statutes, in the presence of two subscribing witnesses, but simply in the presence of two witnesses; and, if the consent be executed in the presence of two witnesses, it is binding upon her,

and cannot, after the death of her husband, be repudiated or avoided: *Neuber v. Shoel*, 8 Kan. App. 845; 55 Pac. Rep. 350, 351.

REFERENCES.

Effect of widow's death before election: See note 2 L. R. A. (N. S.) 959-960. Effect, on administrator, of widow's election: See note 4 L. R. A. (N. S.) 1065-1072. Election to take under will: See note 7 L. R. A. 454. Right of one's creditors or personal representatives to make or control election for or against a will, or between different provisions of a will or statute: See note 11 L. R. A. (N. S.) 379-383. Wills, rule of election between inconsistent rights: See note 12 L. R. A. 227-231.

(2) **Taking both by descent and under the will.** Unless there is a clear manifestation of an intent to devise the whole of the community property, the wife may claim and take both what the law gives her in the community property and also what is given her by the will of her husband in that portion thereof subject to his testamentary disposition. It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome the presumption that he did not intend to devise any property over which he had no power of testamentary disposition, that the wife can be put to her election either to take under the will or to take what she is entitled to by law: *Estate of Gilmore*, 81 Cal. 240, 243; 22 Pac. Rep. 655. In the absence of a statute to the contrary, a wife might claim the half of her deceased husband's estate, under the law of descents and distributions, and also take the benefit of his will. The husband may do the same with respect to his deceased wife's estate, where the law gives each the same interest in the other's property: *Moore v. Herd* (Kan.), 93 Pac. Rep. 157, 158.

(3) **Where dower right prevails.** Under the Montana statute, which provides for dower rights of the widow, or for an election under the will, where the widow has not renounced her rights under the will, but, on the contrary, has taken thereunder, she is barred from claiming dower: *Chadwick v. Tatem*, 9 Mont. 354; 23 Pac. Rep. 729, 732.

REFERENCES.

Election between right of dower and benefits of a will may be compelled when: See note 92 Am. St. Rep. 695-705.

(4) **Effect of election.** The widow's election, or renunciation of a right under the will, does not nullify the will as to other bequests, nor take from the legatees therein their rights under the same. Except as to the widow, the will is operative and binding: In re

Little's Estate, 22 Utah, 204; 61 Pac. Rep. 899, 901. When the wife repudiates the will, and elects not to take thereunder, she is entitled to take to the extent of her statutory rights as fully and completely as if there had been no will: Estate of Bump (Cal.), 92 Pac. Rep. 643, 644. Where the widow renounces under the will, and elects to take under the statute, the effect of this and the birth of the testator's child after the making of the will, though not revoking that instrument, renders its devises and legacies nugatory, and the wife and child become entitled each to one half of the property of the estate under the statute: *In re Hobson's Estate* (Col.), 91 Pac. Rep. 929, 930.

(5) **Election under mistake or misapprehension.** The acts and declarations relied upon, to prove an election by the widow to take under the will, must be unequivocal, and must clearly evince an intention to elect and take under the will. The choice must be made by the widow with full knowledge of her rights and of the status of the estate: *Reville v. Dubach*, 60 Kan. 572; 57 Pac. Rep. 522, 523. Where the widow executes an instrument of so-called election or waiver under the will, and there is nothing in the terms of the will to indicate an intention on the part of the testator to dispose of the widow's share of the community property, and the purported waiver was executed under a misapprehension of her rights, as disclosed by the will itself, such so-called election or waiver is wholly void: *Estate of Wickersham*, 138 Cal. 355; 70 Pac. Rep. 1076, 1078.

(6) **Election by acceptance of devise.** Where the testator devises to his wife "one half of all my estate," etc., and the widow accepts the devises and bequests provided for her by the will, she thereby makes her election and confirms the disposition made by her husband of the common property: *Estate of Stewart*, 74 Cal. 98; 15 Pac. Rep. 445, 447 (*McFarland, Thornton, and Sharpstein, JJ., dissenting*). Where a testator disposes of his estate by will, from which it appears that his evident intent was to embrace not only his separate property, but also the entire community property, his widow is not compelled to accept the provision made for her, but may repudiate the will entirely, and then insist upon the share of the estate which the law allows her. But in such a case, she is put to her election, and if the distribution is made in accordance with the will, it will be presumed that the widow chose the provisions of the will, although the record fails to expressly disclose whether she made any election or not: *Estate of Vogt*, 36 Cal. Dec. 392, 394 (Nov. 13, 1908).

(7) **Election by acts in pais.** An election by a widow to take under the will, is not required to be proved by the record as to such

election, and estoppel in pais may be proved and held effectual: *Reville v. Dubach*, 60 Kan. 572; 57 Pac. Rep. 522, 523. An election by a widow, to take under a will, may be made by an act in pais, and if the act is plain and unequivocal, and done with full knowledge of the widow's rights, and of the condition of the estate, such election is as binding as though it were formally made: *Reville v. Dubach*, 60 Kan. 572; 57 Pac. Rep. 522, 523.

20. Vesting and divesting of estates.

(1) **In general.** A will speaks from the death of the testator, and not from its date, unless its language, by a fair construction, indicates a contrary intention: *Morse v. Macrum*, 22 Or. 229; 29 Pac. Rep. 615. Under the common law, a will takes effect at the death of the testator, unless its language, by a fair construction, indicates otherwise, and a legacy or bequest provided for therein does not become vested until that time: *Scott v. Ford* (Or.), 97 Pac. Rep. 99, 101. If the testator has acquired other property than that mentioned in the will, it passes by the will; and if conveyances which he gave are void, the title never having passed from the testator, it passes by the will: *Woodward v. Woodward*, 33 Col. 457; 81 Pac. Rep. 322, 323. Every will furnishes its own law. The language of such instruments is so various that only the most general rules can be laid down for guidance in their interpretation. One of these rules is that the law favors the vesting of estates, and the intent to create a contingent remainder will not be presumed, but must be clearly expressed: *McLaughlin v. Penney*, 65 Kan. 523; 70 Pac. Rep. 341, 344. When an estate is given or granted to several persons jointly, without any expression indicating an intention that it shall be divided among them, it must be construed to be a joint tenancy: *Noble v. Teeple*, 58 Kan. 398; 49 Pac. Rep. 598, 599. Will construed as not giving any present vested interest or estate in the property in contest: *Demartini v. Allegretti*, 146 Cal. 214; 79 Pac. Rep. 871. A will devising an undivided one-half interest to the husband of the testatrix construed as vesting in the husband title to the lands therein described, subject to the trust imposed by the will, even though it did not take effect for all purposes until the will was probated. When probated, the title relates back to the death of the testator: *Christofferson v. Pfemmig*, 16 Wash. 491; 48 Pac. Rep. 264, 265.

REFERENCES.

Consult notes to the following sections of *Kerr's Cal. Cyc. Civ. Code*, as to the matters indicated: Conveyances from person claiming by succession, when not impaired by devise from whom succession is claimed, § 1364; devise or legacy to more than one person vests in them as owners in common, § 1350; devises, etc., to a person on attaining majority, are presumed to vest at testator's death, § 1341;

death of legatee before testator, lineal descendants to take estate, § 1310. Devestiture of estates of persons not in being: See note 8 L. R. A. (N. S.) 49-77.

(2) **As to expectancies.** An heir may convey to the residuary legatees his interest in the estate, but, so far as such conveyance purports to convey his expectant interest in his mother's estate, it is illegal and void: *Estate of Wickersham*, 138 Cal. 355; 70 Pac. Rep. 1076, 1078.

(3) **Gifts inter vivos distinguished.** The elements necessary to the validity of a gift inter vivos have been specifically stated as follows: 1. The donor must be competent to contract. 2. There must be freedom of will. 3. The gift must be complete, with nothing left undone. 4. The property must be delivered by the donor and accepted by the donee. 5. The gift must go into immediate and absolute effect: *Fisher v. Ludwig* (Cal. App.), 91 Pac. Rep. 658, 660. Where the donor gives to the donee the means whereby he may reduce the property to his possession, as for example, where he gives an order upon a bank where money of the donor is deposited, such gift is valid, inter vivos, even though the bank did not actually transfer the money to the account of the donee until the day after the death of the donor: *Fisher v. Ludwig* (Cal. App.), 91 Pac. Rep. 658, 660.

(4) **Gifts causa mortis distinguished.** A gift causa mortis is operative to transfer the title and vest it in the donee at once. The essential difference between a gift inter vivos and a donatio causa mortis is that the former must take effect during the life of the donor absolutely, completely, and irrevocably; while the latter, though a present transfer of title, is incomplete, and subject to be divested by the happening of any one of the conditions, namely, revocation by the donor, his survival of the apprehended peril, or the want of sufficient evidence to discharge his debts and liabilities, in which last-mentioned case it would be fraudulent as to creditors: *De Neff v. Helms*, 42 Or. 164; 70 Pac. Rep. 390, 391. In a gift causa mortis a written instrument is not necessary. The most characteristic mark of distinction between a legacy and such a gift is the change of possession: *Noble v. Garden*, 146 Cal. 225; 79 Pac. Rep. 883; *Fite v. Perry* (Cal. App.), 96 Pac. Rep. 102, 103. Where the donee testifies that it was not intended to transfer possession until the death of the donor, a finding, in effect, that the gift was a gift causa mortis, will not be sustained: *Fite v. Perry* (Cal. App.), 96 Pac. Rep. 102, 104. A gift causa mortis is not contrary to public policy and will be upheld, when established: *DeNeff v. Helms*, 42 Or. 164; 70 Pac. Rep. 390, 393. Provisions relating to gifts causa mortis: See *Noble v.*

Garden, 146 Cal. 225; 79 Pac. Rep. 883, 885; legacy or gift in contemplation, fear, or peril of death: See note *Kerr's Cal. Civ. Code*, § 1367.

(5) **Property under contract of sale.** Heirs take subject to the rights of third parties under contracts relating to the property, and made with the deceased before his death. The heir cannot take anything more than the devisor had at the time of his death, and the will cannot operate to abridge or destroy rights which have already attached to the estate. Where the testator had entered into a contract of sale of property, the only interest that he could have assigned, conveyed, or devised, was the right to the money which represented the purchase price (excepting, of course, the right to rescind under certain contingencies): *Hyde v. Heller*, 10 Wash. 586; 39 Pac. Rep. 249.

(6) **Property subject to trust.** Real estate which is made the subject of a trust by the will, and directed to be sold and turned into money, does not descend to the heir, but the title rests in the trustee, until the purpose of the trust is effected by the actual exchange of the land for money: *Martin v. Preston* (Wash.), 94 Pac. Rep. 1087, 1089.

(7) **Deeds as affected by deeds in escrow.** An instrument delivered in escrow takes effect only on the performance of the prescribed conditions and a second delivery, and is not operative until the conditions are performed and the second delivery is made. Under this doctrine it has been held that where a deed to mining property is placed in escrow, and the testator dies before the performance of the conditions and the second delivery, the estate is "not wholly divested," and title passes by the terms of the will, subject to the right of specific performance of the grantee, in the escrow deed, upon the performance of the conditions: *Chadwick v. Tatem*, 9 Mont. 354, 364; 23 Pac. Rep. 729, 731.

(8) **Contingent remainders.** A devise by a testator to his son, of a remainder, to take effect upon certain conditions, after the termination of a life estate in the testator's wife, vests in the son such an interest in the property, under the terms of his father's will, as would permit him to convey the same by contract: *Coats v. Harris*, 9 Ida. 458; 75 Pac. Rep. 243, 245, 246.

(9) **Lapsed legacies and devises.** The postponement of payment of legacies, that the testator's estate shall be kept, does not necessarily preclude the vesting of the legacies, under the rule that, if a legacy does not vest in the lifetime of the legatee, it lapses into

the estate out of which it was to be paid, or passes over to some other named legatee or devisee: *McLaughlin v. Penney*, 65 Kan. 523; 70 Pac. Rep. 341, 344. A legacy lapses when the devisee dies before the testator, and there is no other person authorized to take under the will: *Shadden v. Hembree*, 17 Or. 14; 18 Pac. Rep. 572, 576. If a legatee dies before the testator, the legacy lapses and falls into the body of the estate, and is not payable to his executor or administrator: *Scott v. Ford* (Or.), 97 Pac. Rep. 99, 101. The Civil Code of California abrogates the old common-law distinction, between devises of real property and bequests of personal property, to the effect that a devise speaks from the date of the will and a bequest from the death of the testator, and, according to which distinction, it was generally held that property mentioned in a void or lapsed devise did not go to the residuary devisee. Under the code, lapsed devises go to the residuary devisee. Under the old authorities, before any change was made by statute, it was uniformly held that lapsed bequests went to the residuary legatee, and not to the heir. In New York, the statutory law is, that a will which in terms disposes of all the testator's real property shall be construed to pass all the real property which he was entitled to devise at the time of his death; and under that statute it has been uniformly held, in that state, that property mentioned in a lapsed devise goes to the residuary devisee, and not to the heir, unless a contrary intent is clearly expressed in the will. The statutory provisions of California are clear to the point that lapsed devises take the same course as lapsed bequests: *Estate of Upham*, 127 Cal. 90; 53 Pac. Rep. 315, 316.

REFERENCES.

Death of devisee or legatee during lifetime of testator, effect of: See note **Kerr's Cal. Cyc. Civ. Code**, § 1343. Death of devisee of limited interest before testator's death, effect of: See note **Kerr's Cal. Cyc. Civ. Code**, § 1344.

(10) **Altered circumstances.** 'If a will devises nothing but a particular piece of land, and the testator afterwards sells that land, a revocation of the devise may be implied; and so if a testament simply bequeaths specific chattels which are otherwise disposed of during one's life, there remains, at all events, nothing for his will to operate upon. But one's estate may over and over again change in value and specific character between the date of executing it and his death. The proportions as between various beneficiaries may greatly change beyond what he had intended. He may part with this piece of property and acquire that. One object of his bounty may die, and another may come into existence. He may even die so involved in debt, or utterly bankrupt, as in effect to annihilate the gifts which his own testament professes to bestow. All this, however, does not, at our day,

revoke in any such sense as to set the instrument practically aside in whole or in part, or disentitle it to probate. The testator's appointment of executor still takes effect. His scheme of disposition is not superseded in form; it only becomes a matter of practical administration, assisted by legal construction of the will, to determine how far and in what proportions his gifts may have failed, if they fail at all, under his unrevoked testament. * * * In short, revocation of a particular will by mere inference of law or presumption is limited to a very few instances in our modern practice; while, on the other hand, changes in the condition of the testator's affairs, or through the mortal chances to which he and his beneficiaries are exposed, may work out a very different settlement and distribution of his estate after his death from what the will purported to arrange. Modern legislation itself repudiates in England and some of our states the whole theory of a presumed intention to revoke on the ground of an alteration in circumstances; and what is left of that theory, aside from such statutes, it would be very difficult to say': Woodward v. Woodward, 33 Col. 457; 81 Pac. Rep. 322, 323; quoting from Schouler on Wills, section 427.

PART XVI.

PROBATE OF WILLS.

CHAPTER I.

PETITION, NOTICE, AND PROOF.

- § 957. Custodian of will to deliver same, to whom.
- § 958. Who may petition for probate of will.
- § 959. Contents of petition.
- § 960. Form. Petition for probate of will.
- § 961. Form. Petition by corporation for probate of will.
- § 962. Form. Renunciation by person named in will, of right to letters testamentary.
- § 963. Executor forfeits right to letters when.
- § 964. Form. Forfeiture of executor's right to letters.
- § 965. Production of will in possession of third person.
- § 966. Form. Petition for production and probate of will in possession of third person.
- § 967. Form. Order requiring third person having possession of a will to produce it.
- § 968. Form. Warrant of commitment for failure to produce will.
- § 969. Notice of petition for probate, how given.
- § 970. Form. Time fixed by clerk for hearing probate of will and petition for letters testamentary.
- § 971. Form. Affidavit of posting notice of time set for hearing probate of will.
- § 972. Form. Affidavit of publication of notice of time and place appointed for probate of will.
- § 973. Notification to heirs and named executors.
- § 974. Form. Affidavit of mailing notice to heirs.
- § 975. Form. Proof of personal service of notice.
- § 976. Order to enforce production of wills or attendance of witnesses.
- § 977. Hearing proof of will after proof of service of notice.
- § 978. Form. Consent of attorney of minors, etc., to probate of will.
- § 979. Form. Testimony of subscribing witnesses on probate of will.
- § 980. Form. Testimony of applicant on probate of will.
- § 981. Who may appear and contest the will.

§ 982. Admitting will to probate.

§ 983. Holographic wills.

§ 984. Form. Certificate of proof of holographic will, and facts found.

PROBATE OF WILLS.

- | | |
|---|---|
| 1. Nature of proceeding. | (2) As to identity of persons misnamed. |
| 2. Jurisdiction of courts. | (3) Wills executed by blind persons. |
| (1) In general. | (4) Presumptions as to the will. |
| (2) Prerequisites to jurisdiction. | (5) Alteration of will. Effect of. |
| (3) As to non-residents. | 8. Order or decree admitting will to probate. |
| (4) Destruction of will as affecting. | (1) In general. |
| (5) Involves power to postpone hearing. | (2) Effect of decree. |
| 8. Parties. | (3) Establishes the will prima facie. |
| (1) Who may apply for probate. | (4) Conclusiveness of decree. |
| (2) Who cannot oppose probate. | (5) Decree annulling the will. |
| 4. Notice of application for probate. | (6) Gives right to letters testamentary. |
| 5. Pleadings. | 9. Probate of after-discovered will. |
| (1) Petition for probate. | 10. Revoked will cannot be admitted to probate. |
| (2) Issues. | 11. Admission to probate under special act. |
| 6. Burden of proof. | 12. Probate of holographic will. |
| (1) In general. | 18. Costs of probate. |
| (2) Presumption of sanity. | |
| 7. Evidence. | |
| (1) Testimony of subscribing witnesses. | |

§ 957. Custodian of will to deliver same, to whom. Every custodian of a will, within thirty days after receipt of information that the maker thereof is dead, must deliver the same to the superior court having jurisdiction of the estate, or to the executor named therein. A failure to comply with the provisions of this section makes the person failing responsible for all damages sustained by any one injured thereby.

Kerr's Cyc. Code Civ. Proc., § 1298.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1600.

Colorado. 3 Mills's Ann. Stats., secs. 4671, 4672.

Idaho.* Code Civ. Proc. 1901, sec. 3995.

Montana.* Code Civ. Proc., sec. 2320.

Nevada. Comp. Laws, secs. 2787, 2788, 2790.

New Mexico. Comp. Laws 1897, sec. 1977.

North Dakota. Rev. Codes 1905, § 7994.

Oklahoma.* Rev. Stats. 1903, sec. 1486.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1103.

South Dakota.* Probate Code 1904, § 34.

Utah. Rev. Stats. 1898, sec. 3785.

Washington. Pierce's Code, §§ 2364, 2378, 2380.

Wyoming.* Rev. Stats. 1899, sec. 4571.

§ 958. **Who may petition for probate of will.** Any executor, devisee, or legatee named in any will, or any other person interested in the estate, may, at any time after the death of the testator, petition the court having jurisdiction to have the will proved, whether the same be in writing, in his possession or not, or is lost or destroyed, or beyond the jurisdiction of the state, or a nuncupative will. **Kerr's Cyc. Code Civ. Proc.**, § 1299.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1601.

Idaho.* Code Civ. Proc. 1901, sec. 3996.

Montana.* Code Civ. Proc., sec. 2321.

Nevada. Comp. Laws, secs. 2789, 2791, 2792.

Oklahoma.* Rev. Stats. 1903, sec. 1487.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1104.

South Dakota.* Probate Code 1904, § 35.

Utah. Rev. Stats. 1898, sec. 3786.

Wyoming.* Rev. Stats. 1899, sec. 4572.

§ 959. **Contents of petition.** A petition for the probate of a will must show:

1. The jurisdictional facts;
2. Whether the person named as executor consents to act, or renounces his right to letters testamentary;
3. The names, ages, and residences of the heirs, legatees, and devisees of the decedent, so far as known to the petitioner;
4. The probable value and character of the property of the estate;
5. The name of the person for whom letters testamentary are prayed.

No defect of form or in the statement of jurisdictional facts actually existing, shall make void the probate of a will. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 491), § 1300.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 781, p. 306.
Arizona. Rev. Stats. 1901, par. 1602.
Idaho. Code Civ. Proc. 1901, sec. 3997.
Montana. Code Civ. Proc., sec. 2322.
Nevada. Comp. Laws, sec. 2789.
North Dakota. Rev. Codes 1905, §§ 7934, 8000, 8004.
Oklahoma. Rev. Stats. 1903, sec. 1488.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1119.
South Dakota. Probate Code 1904, § 36.
Utah. Rev. Stats. 1898, sec. 3787.
Wyoming. Rev. Stats. 1899, sec. 4573.

§ 960. Form. Petition for probate of will.

[Title of court.]

[Title of estate.]

{ Department No. ____
 { [Title of form.]

To the Honorable the ____ Court of the County¹ of ____,
 State of ____:

The petition of ____, of the county² of ____, state of
 ____, respectfully shows:

That ____ died on or about the ____ day of ____, 19____,
 at ____;³

That said deceased, at the time of his death, was a resi-
 dent of the county⁴ of ____, state of ____, and left prop-
 erty in the county⁵ of ____, state of ____;

That the character of the said property and probable
 revenue therefrom are as follows, to wit: ____;⁶

That the estate and effects in respect to which the pro-
 bate of the will is herein applied for does not exceed in
 value the sum of ____ dollars (\$____);

That said deceased left a will bearing date the ____ day
 of ____, 19____, which your petitioner believes is, and there-
 fore alleges to be, the last will of said deceased, and which
 is herewith presented to said ____⁷ court;

That petitioner is named in said will as executor thereof,
 and consents⁸ to act as such executor;

That the names, ages, and residences of the devisees and
 legatees under said will, so far as known to your petitioner,
 are as follows, to wit:

Names.	Approximate ages.	Residences.
_____	_____	_____
_____	_____	_____

That the subscribing witnesses to the said will are _____, residing in the county ⁹ of _____, state of _____, and _____, residing in the county ¹⁰ of _____, in said state;

That the next of kin of said testator, whom your petitioner is advised and believes, and therefore alleges to be the heirs at law of said testator, and the names, ages, and residences of said heirs, so far as known to your petitioner, are as follows, to wit, —

Names.	Approximate ages.	Residences. ¹¹
_____	_____	_____
_____	_____	_____

That at the time said will was executed, to wit, on the said _____ day of _____, 19____, the said testator was over the age of eighteen (18) years, to wit, of the age of _____ (—) years, or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, and was in every respect competent, by last will, to dispose of all his estate;

That said will is in writing, signed by the said testator and duly attested by said subscribing witnesses.

Wherefore your petitioner prays that the said will may be admitted to probate; that letters testamentary be issued to your petitioner; that, for that purpose, a time be appointed for proving said will; that all persons interested be notified to appear at the time appointed for proving the same; and that all other necessary and proper orders may be made in the premises.

Dated _____, 19____. _____, Petitioner.
 _____, Attorney for Petitioner.

Explanatory notes. 1. Or, City and County. 2. Or, city and county. 3. State place. 4, 5. Or, city and county. 6. Give particulars. 7. Title of court. 8. Or, renounces his right. 9, 10. Or, city and county. 11. Give addresses to which notices should be mailed. Contents of petition: See § 959, ante.

§ 961. Form. Petition by corporation for probate of will.

[Title of court.]

[Title of estate.]

{	Department No. ____
	[Title of form.]

The petition of the ____ Company respectfully shows:

That petitioner is a corporation organized and existing under the laws of the state of ____, and is authorized by its articles of incorporation to act as executor, administrator, guardian, assignee, receiver, depository, or trustee, and has a paid-up capital of not less than ____ thousand dollars (\$____), of which ____ thousand dollars (\$____), has been actually paid in, in cash, and has deposited with the treasurer of said state, for the benefit of its creditors, the further sum of ____ thousand dollars (\$____), in bonds and securities, in compliance with the provisions of ____,¹ which said bonds and securities are now held by said treasurer in his official capacity for the uses and purposes aforesaid, and that petitioner has complied with all the requirements of said act and has procured, from the board of bank commissioners of the state of ____, a certificate of authority stating that it has complied with the requirements of said act and is authorized to act as executor, administrator, guardian, assignee, receiver, depository, or trustee.²

Explanatory notes. 1. Designate the act giving such authority.
2. Proceed as in ordinary petition for probate of will.

§ 962. Form. Renunciation, by person named in will, of right to letters testamentary.

[Title of court.]

[Title of estate.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

Now comes ____, named as executor² in the last will of ____, deceased, and, renouncing his right to letters testamentary under such will, respectfully declines to act as the executor of said last will. _____

Dated ____, 19__.

Explanatory notes. 1. Give file number. 2. Or, as one of the persons named in the last will, etc., where two or more are named.

§ 963. Executor forfeits right to letters when. If the person named in a will as executor, for thirty days after he has knowledge of the death of the testator, and that he is named as executor, fails to petition the proper court for the probate of the will, and that letters testamentary be issued to him, he may be held to have renounced his right to letters, and the court may appoint any other competent person administrator, unless good cause for delay is shown. **Kerr's Cyc. Code Civ. Proc., § 1301.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1603.
- Colorado.** 3 Mills's Ann. Stats., sec. 4692.
- Idaho.*** Code Civ. Proc. 1901, sec. 3998.
- Kansas.** Gen. Stats. 1905, § 2881.
- Montana.*** Code Civ. Proc., sec. 2323.
- Nevada.** Comp. Laws, secs. 2789, 2790.
- Oklahoma.*** Rev. Stats. 1903, sec. 1489.
- South Dakota.*** Probate Code 1904, § 37.
- Utah.*** Rev. Stats. 1898, sec. 3788.
- Washington.** Pierce's Code, § 2379.
- Wyoming.*** Rev. Stats. 1899, sec. 4574.

§ 964. Form. Forfeiture of executor's right to letters.

[Title of court.]

[Title of estate.]

{ No. ____ Dept. No. ____
[Title of form.]

It appearing that the said ____ died testate on or about the ____ day of ____, 19__; that this court has jurisdiction of his estate; and that ____, named by said decedent in his last will, as executor thereof, had knowledge of such death, and that he was named in said will as executor thereof, but has, for thirty (30) days after such knowledge, failed, without good cause shown, to petition this court for the probate of the will, and that letters testamentary be issued to him, —

It is adjudged and decreed, That the said ____ has renounced his right to letters testamentary in said estate.

____, Judge of the ____ Court.

Explanatory note. 1. Give file number.

§ 965. Production of will in possession of third person.

If it is alleged in any petition that any will is in the possession of a third person, and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time named in the order. If he has possession of the will and neglects or refuses to produce it in obedience to the order, he may by warrant from the court be committed to the jail of the county, and be kept in close confinement until he produces it. **Kerr's Cyc. Code Civ. Proc.**, § 1302.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1604.
Colorado. 3 Mills's Ann. Stats., sec. 4673.
Idaho.* Code Civ. Proc. 1901, sec. 3999.
Kansas. Gen. Stats. 1905, §§ 8675, 8678.
Montana.* Code Civ. Proc., sec. 2324.
Nevada. Comp. Laws, secs. 2791, 2792, 2793, 2794.
New Mexico. Comp. Laws 1897, sec. 1977.
North Dakota. Rev. Codes 1905, § 7995.
Oklahoma.* Rev. Stats. 1903, sec. 1490.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 1105.
South Dakota.* Probate Code 1904, § 38.
Washington. Pierce's Code, §§ 2381, 2382, 2383.
Wyoming. Rev. Stats. 1899, sec. 4575.

§ 966. Form. Petition for production and probate of will in possession of third person.

[Title of court.]

[Title of estate.]

{ Department No. ____
 [Title of form.]

To the Honorable the ____ Court of the County ¹ of ____,
 State of ____:

The petition of ____, of the county ² of ____, state of
 ____, respectfully shows:

That ____ died on or about the ____ day of ____, 19____,
 at ____;

That said deceased at the time of his death was a resident of the county ³ of ____, state of ____, and left property in the county ⁴ of ____, state of ____;

That the character of the said property⁵ and probable revenue therefrom are as follows, to wit: —;⁶

That the value of the estate and effects in respect to which the probate of the will is herein applied for does not exceed the sum of — dollars (\$—);

That said deceased left a will bearing date the — day of —, 19—, which is in the possession of a third person, to wit, one —, and has never been presented for probate;

That your petitioner is the widow⁷ of deceased, and is interested in the estate of said decedent;

That — is the person named as executor in said will, and consents to act as such;⁸

That the names, ages, and residences of the heirs of said decedent, so far as known to your petitioner, are as follows, to wit, —

Names.	Ages.	Residences.
—, widow of decedent,	— years,	—;
—, son of decedent,	— years,	—;

and that the names, ages, and residences of his devisees and legatees are as follows, to wit: —

Names.	Ages.	Residences.
—, devisee,	— years,	—;
—, devisee,	— years,	—;

Wherefore your petitioner prays that a day of court may be appointed for the hearing of this petition; that legal notice thereof be given; that an order issue forthwith to the said —, requiring him to produce said will at such hearing; and that upon said hearing, such will, if produced in court, be admitted to probate, and letters testamentary thereon be issued to —, the person named in said will as executor. —, Petitioner.

—, Attorney for Petitioner.

Explanatory notes. 1. Or, City and County. 2-4. Or, city and county. 5. Give description of property, and state whether it is the separate property of decedent, or the community property of decedent and his widow, naming her. 6. State facts as to probable revenue. 7. Or, whatever other interest petitioner may have. 8. Or,

that he renounces his right to letters testamentary. If the name of the executor is unknown, allege such fact, and that petitioner cannot, therefore, state whether such person consents to act as executor, or renounces his right to letters testamentary.

§ 967. Form. Order requiring third person having possession of a will to produce it.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It being alleged in the petition of ____, widow of ____, deceased, now on file in this court, that the will of said ____, now deceased, is in the possession of a third person, viz., one ____, and the court being satisfied that such allegation is correct,² —

It is ordered, That the said ____ produce the said will on or before the ____ day of ____, 19__, at ____ o'clock in the forenoon of said day, and file the same in this court; and that a copy of this order be served upon said ____ at least ____⁴ days before said time.

Dated ____, 19__. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. To satisfy the court, an affidavit should be filed with the petition, or a witness be examined. 3. Or, afternoon. 4. As directed by the judge.

§ 968. Form. Warrant of commitment for failure to produce will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

A petition having been filed herein on the ____ day of ____, 19__, by the widow of ____, deceased, in which it was alleged that ____, a third person, had in his possession the will of said deceased, this court, being satisfied² that such allegation was true, thereupon made and entered the following order, to wit, ____,³ which was served as therein directed, —

And it appearing that the said ____ has failed to obey said order, and still refuses to obey it, and it being shown⁴ that said will is still in the possession of said ____, he is

therefore adjudged guilty of contempt of court for such failure and refusal; and

It is ordered, That said _____ be committed to the county jail of the county * of _____, state of _____, there to be kept in close confinement until he produces said will in obedience to the order of this court.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. From affidavit filed with the petition, showing fact that the will was in the possession of such third person. 3. Insert copy of the order. 4. Make showing by examination of witness. 5. Or, city and county.

§ 969. Notice of petition for probate, how given. When the petition is filed, and the will produced, the clerk of the court must set the petition for hearing by the court upon some day not less than ten nor more than thirty days from the production of the will. Notice of the hearing shall be given by such clerk by publishing the same in a newspaper of the county; if there is none, then by three written or printed notices, posted at three of the most public places in the county.

If the notice is published in a weekly newspaper, it must appear therein on at least three different days of publication; and if in a newspaper published oftener than once a week, it shall be so published that there must be at least ten days from the first to the last day of publication, both the first and the last day being included. If the notice is by posting, it must be given at least ten days before the hearing. **Kerr's Cyc. Code Civ. Proc., § 1303.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1605.

Colorado. 3 Mills's Ann. Stats., secs. 4675, 4676.

Idaho. Code Civ. Proc. 1901, sec. 4000.

Montana.* Code Civ. Proc., sec. 2325.

Nevada. Comp. Laws, sec. 2795.

New Mexico. Comp. Laws, secs. 1978, 1979.

North Dakota. Rev. Codes 1905, § 8002.

Oklahoma. Rev. Stats. 1903, sec. 1491.

South Dakota. Probate Code 1904, § 39.

Utah. Rev. Stats. 1898, sec. 3789.

Wyoming. Rev. Stats. 1899, sec. 4576.

§ 970. Form. Time fixed by clerk for hearing probate of will and petition for letters testamentary.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

An instrument in writing which purports to be the last will of ____, deceased, having on this day come into the possession of said ____² court, and a petition for the probate thereof, and for the issuance of letters testamentary to ____, having been filed by ____, —

Now I, ____, clerk of said ____³ court, hereby fix and appoint ____,⁴ the ____ day of ____, 19__, at ____ o'clock in the forenoon⁵ of said day, and the court-room of said court, at the court-house⁶ in the said county⁷ of ____, state of ____, as the time and place for proving said will and for hearing said petition.

Dated ____, 19__. ____, Clerk of said Court.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2, 3. Title of court. 4. Day of week. 5. Or, afternoon. 6. State location of court-house. 7. Or, city and county.

§ 971. Form. Affidavit of posting notice of time set for hearing probate of will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of ____,
County² of ____, } ss.

____, deputy county clerk of said county, being duly sworn, says:

That on the ____ day of ____, 19__, he posted correct and true copies of the within notice in three of the most public places in said county, to wit; one of the said copies at the place at which the court is held, one at ____,³ and one at ____,⁴ in said county.

Subscribed and sworn to before me this ____ day of ____, 19__.
____, County Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. The United States post-office in ____ 4. The city hall in ____ This affidavit is to be attached to a copy of the notice.

§ 972. Form. Affidavit of publication of notice of time and place appointed for probate of will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County² of _____, } ss.

_____, of the said county and state, having been first duly sworn, deposes and says:

That he is, and at all times embraced in the publication herein mentioned was, the principal clerk³ of the printers and publishers of the _____, a newspaper of general circulation,⁴ printed and published daily (Sundays excepted) in said county;⁵

That deponent, as such clerk, during all times mentioned in this affidavit has had, and still has, charge of all the advertisements in said newspaper; and

That a notice of the time and place appointed for the probate of a will, of which the annexed is a true printed copy, was published in the above-named newspaper on the following dates, to wit, _____;⁶ being as often as said newspaper was published during said period; and further deponent saith not.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, Notary Public in and for the County⁷ of _____, State of _____.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Or, the printer; or, the foreman of the printer, etc. 4. Section 1303 of the Code of Civil Procedure of California does not strictly require publication in a newspaper "of general circulation" published in the county; and, if the publication is made in a newspaper published in the county, it is a sufficient compliance with the statute: Estate of Melone, 141 Cal. 331, 334; 74 Pac. Rep. 991. 5. Or, city and county. 6. Put in each date. This affidavit should be annexed to a copy of the notice. 7. Or, city and county.

§ 973. Notification to heirs and named executors. Copies of the notice of the time appointed for the probate of the will must be addressed to the heirs of the testator resident in the state, at their places of residence, if known to the

petitioner, and deposited in the post-office, with the postage thereon prepaid, at least ten days before the hearing. If their places of residence be not known, the copies of notice may be addressed to them, and deposited in the post-office at the county seat of the county where the proceedings are pending. A copy of the same notice must in like manner be mailed to the person named as executor, if he be not the petitioner; also, to any person named as co-executor not petitioning, if their places of residence be known. Proof of mailing the copies of the notice must be made at the hearing. Personal service of copies of the notice at least ten days before the day of hearing is equivalent to mailing. **Kerr's Cyc. Code Civ. Proc., § 1304.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1606.
Colorado. 3 Mills's Ann. Stats., secs. 4675, 4676.
Idaho.* Code Civ. Proc. 1901, sec. 4001.
Montana.* Code Civ. Proc., sec. 2326.
Nevada. Comp. Laws, secs. 2797, 2798.
New Mexico. Comp. Laws 1897, secs. 1979, 1980.
North Dakota. Rev. Codes 1905, § 8001.
Oklahoma. Rev. Stats. 1903, sec. 1492.
South Dakota. Probate Code 1904, § 40.
Wyoming.* Rev. Stats. 1899, sec. 4577.

§ 974. Form. Affidavit of mailing notice to heirs.

[Title of court.]

[Title of estate.] { No. ____ Dept. No. ____
 [Title of form.]

State of _____,
 County ¹ of _____, } ss.

_____, being duly sworn, deposes and says:

That he is a male citizen of the United States, over the age of twenty-one years, competent to be a witness in the matter of the above-entitled estate; that on the _____ day of _____, 19____, he addressed to each of the parties herein named, at their respective places of residence, to wit, —

To _____,	residing at _____;
To _____,	residing at _____;
To _____,	residing at _____;

and deposited the same in sealed envelopes in the United States post-office, at _____,² state of _____, postage prepaid, a copy of the notice of the time and place appointed for hearing the petition for the probate of the will of said deceased, a copy of which notice is hereto annexed, being at least ten (10) days before the time appointed for said hearing.

Subscribed and sworn to before me this _____ day of _____, 19____, _____, Deputy County Clerk.

Explanatory notes. 1. Or, City and County. 2. State place and county.

§ 975. Form. Proof of personal service of notice.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

_____, being duly sworn, says:

That he is over twenty-one years of age, not interested in the above-entitled estate and is competent to be a witness in the matter of said estate; that on the _____ day of _____, 19____, he served notice of the time appointed for the probate of the will of the above-named decedent upon _____, _____, and _____, the persons named in said notice, by delivering to each of them, personally, in the said county² of _____, state of _____, a copy of said notice, the original of which is hereto annexed.

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, County Clerk of said County³ of _____.⁴

Explanatory notes. 1. Give file number. 2, 3. Or, city and county.
4. Or other officer authorized to take the oath.

§ 976. Order to enforce production of wills or attendance of witnesses. A judge of the superior court may at any time make and issue all necessary orders and writs to enforce the production of wills and the attendance of witnesses. **Kerr's Cyc. Code Civ. Proc., § 1305.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1607.**Colorado.** 3 Mills's Ann. Stats., sec. 4680.**Idaho.** Code Civ. Proc. 1901, sec. 4002.**Montana.** Code Civ. Proc., sec. 2327.**Nevada.** Comp. Laws, sec. 2796.**Oklahoma.** Rev. Stats. 1903, sec. 1493.**South Dakota.** Probate Code 1904, § 41.**Wyoming.** Rev. Stats. 1899, sec. 4578.

§ 977. **Hearing proof of will after proof of service of notice.** At the time appointed for the hearing, or the time to which the hearing may have been postponed, the court, unless the parties appear, must require proof that the notice has been given, which being made, the court must hear testimony in proof of the will. **Kerr's Cyc. Code Civ. Proc.**, § 1306.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1608.**Colorado.** 3 Mills's Ann. Stats., sec. 4679.**Idaho.** Code Civ. Proc. 1901, sec. 4003.**Montana.*** Code Civ. Proc., sec. 2328.**Nevada.** Comp. Laws, sec. 2800.**New Mexico.** Comp. Laws 1897, sec. 1982.**Oklahoma.** Rev. Stats. 1903, sec. 1494.**South Dakota.** Probate Code 1904, § 42.**Wyoming.** Rev. Stats. 1899, sec. 4579.

§ 978. **Form. Consent of attorney of minors, etc., to probate of will.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

I _____, appointed by said _____² court, attorney of the minors, _____ and _____, who are interested in the said estate, to represent them on the hearing of the testimony in proof of a certain instrument in writing filed in said court on the _____ day of _____, 19____, purporting to be the last will of said deceased, do hereby appear on behalf of said minors and consent that the said written instrument,

purporting to be the last will of said deceased, as aforesaid, be allowed and recorded herein, and be admitted to probate in said court, as the last will of said deceased, and that letters testamentary be issued to _____ according to the prayer of the petition filed herein on the _____ day of _____, 19____.

_____, Attorney for said minors, _____³ and _____.⁴

Dated _____, 19____.

Explanatory notes. 1. Give file number. 2. Give title of court. 3, 4. Giving their names.

§ 979. Form. Testimony of subscribing witnesses on probate of will.

[Title of court.]

[Title of estate.]

{ Department No. _____
[Title of form.]

State of _____,
County¹ of _____, } ss.

_____, of lawful age, and a competent witness, being duly sworn in open court, testifies as follows:

I reside in the county² of _____, state of _____.

I knew _____ on the _____ day of _____, 19____, the date of the instrument now shown to me, which is marked as filed in this court on the _____ day of _____, 19____, and which purports to be the last will of the said _____, now deceased.

I am one of the subscribing witnesses to said instrument. I also knew, at the date of said instrument, _____, the other subscribing witness.

The said instrument was signed and sealed by the said _____, now deceased, at _____, in the county³ of _____, state of _____, on the said _____ day of _____, 19____, the day it bears date, in the presence of myself and of said _____; and the said _____, now deceased, thereupon published the said instrument as, and, to us, declared the same to be, his last will, and requested us in attestation thereof to sign the same as witnesses. The said _____ and I, then and there, in the presence of the said _____, now deceased, and in the presence of each other, subscribed our names as witnesses to the said instrument.

At the time of executing the said instrument, to wit, the _____ day of _____, 19____, the said _____, now deceased, was over the age of eighteen (18) years, to wit, of the age of _____ () years or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence. _____

Subscribed and sworn to in open court before me this _____ day of _____, 19____. _____, Deputy County Clerk.

Explanatory notes. 1. Or, City and County. 2, 3. Or, city and county.

§ 980. Form. Testimony of applicant on probate of will.

[Title of court.]

[Title of estate.]

{ No. _____ Dept. No. _____
[Title of form.]

State of _____,
County¹ of _____, } ss.

_____, being duly sworn in open court, testifies as follows:

I am _____, the person named as executor in the written instrument now shown to me, marked as filed in this court on the _____ day of _____, 19____, and which purports to be the last will and testament of _____, deceased.

I reside in the county² of _____, state of _____, and am of the age of twenty-one years and upwards.

I knew said _____; he is dead; he died on or about the _____ day of _____, 19____, at _____,³ in the said county⁴ of _____, state of _____.

At the time of his death, he was a resident of the county⁵ of _____, and left estate in the said county⁶ of _____, state of _____, the value and character of which property is, to the best of my knowledge, information, and belief, correctly set forth in the petition for the probate of said will.

The real estate is of the value of _____ dollars (\$____), or thereabouts, and the annual rents, issues, and profits of said real estate amount to the sum of _____ dollars (\$____), or thereabouts.

The personal property is of the value of _____ dollars (\$____), or thereabouts.

The said estate and effects, in respect to which the probate of said will has been applied for, do not exceed the value of _____ dollars (\$_____).

All of the estate of said deceased is community property, the same having been acquired since marriage.

The said written instrument came into my possession as follows, to wit, _____; and I believe the same to be the last will of _____, deceased, as due search and inquiry among his effects and elsewhere have been made, but no other written instrument executed by him and purporting to be a will has been found.

The next of kin of said deceased are _____.

On the _____ day of _____, 19____, when said will was executed, said deceased was over the age of eighteen (18) years, being of the age of _____ () years or thereabouts, and was of sound and disposing mind.

Subscribed and sworn to in open court before me this _____ day of _____, 19____. _____, Deputy County Clerk.

Explanatory notes. 1. Or, City and County. 2. Or, city and county. 3. State place. 4-6. Or, city and county. 7. State how. Or, the said instrument in writing was handed to me by, etc., stating the facts. 8. Give names, ages, residences, etc.

§ 981. Who may appear and contest the will. Any person interested may appear and contest the will. Devisees, legatees, or heirs of an estate may contest the will through their guardians, or attorneys appointed by themselves or by the court for that purpose; but a contest made by an attorney appointed by the court does not bar a contest after probate by the party so represented, if commenced within the time provided in article four of this chapter; nor does the non-appointment of an attorney by the court of itself invalidate the probate of a will. **Kerr's Cyc. Code Civ. Proc., § 1307.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1609.

Idaho. Code Civ. Proc. 1901, sec. 4006.

Montana.* Code Civ. Proc., sec. 2329.

Nevada. Comp. Laws, sec. 2801.

Oklahoma. Rev. Stats. 1903, sec. 1495.

South Dakota.* Probate Code 1904, § 43.

Wyoming. Rev. Stats. 1899, sec. 4601.

§ 982. **Admitting will to probate.** If no person appears to contest the probate of a will, the court may admit it to probate on the testimony of one of the subscribing witnesses only, if he testifies that the will was executed in all particulars as required by law, and that the testator was of sound mind at the time of its execution.

If it appears at the time fixed for the hearing that none of the subscribing witnesses reside in the county, but that the deposition of one of them can be taken elsewhere, the court may direct it to be taken, and may authorize a photographic copy of the will to be made and to be presented to such witness on his examination, who may be asked the same questions with respect to it and the handwriting of himself, the testator, and the other witness, as would be pertinent and competent if the original will were present.

If neither the attendance in court nor the deposition of any of the subscribing witnesses can be procured, the court may admit the will to probate upon the testimony of any other witness as provided in section thirteen hundred and seventeen. **Kerr's Cyc. Code Civ. Proc.**, § 1308.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1610.

Colorado. 3 Mills's Ann. Stats., secs. 4681, 4684.

Idaho. Code Civ. Proc. 1901, sec. 4004.

Kansas. Gen. Stats. 1905, §§ 8680, 8681, 8682, 8683.

Montana. Code Civ. Proc., sec. 2330.

Nevada. Comp. Laws, sec. 2802.

New Mexico. Comp. Laws 1897, sec. 1982.

North Dakota. Rev. Codes 1905, § 8005.

Oklahoma. Rev. Stats. 1903, sec. 1496.

South Dakota. Probate Code 1904, § 44.

Utah. Rev. Stats. 1898, sec. 3792.

Washington. Pierce's Code, §§ 2385, 2386, 2387, 2388, 2389.

Wyoming. Rev. Stats. 1898, sec. 4694.

§ 983. **Holographic wills.** An olographic will may be proved in the same manner that other private writings are proved. **Kerr's Cyc. Code Civ. Proc.**, § 1309.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1611.

Idaho.* Code Civ. Proc. 1901, sec. 4005.

Montana.* Code Civ. Proc., sec. 2331.

Nevada.* Comp. Laws, sec. 3094.

Oklahoma.* Rev. Stats. 1903, sec. 1497.

South Dakota.* Probate Code 1904, § 45.

Utah. Rev. Stats. 1898, sec. 2736.

Wyoming. Rev. Stats. 1899, sec. 4581.

§ 984. **Form. Certificate of proof of holographic will, and facts found.**

[Title of court.]

[Title of estate.]

{ No. ____.¹ Dept. No. ____
[Title of form.]

State of _____,
County ² of _____, } ss.

I _____, Judge of said _____³ Court, hereby certify:

That on the _____ day of _____, 19____, the annexed instrument was admitted to probate, as the last will of _____, deceased, and from the proofs taken and the examination had therein, the said court finds as follows:

That said _____ died on or about the _____ day of _____, 19____, in the county ⁴ of _____, state of _____; that at the time of his death he was a resident of the county ⁵ of _____, state of _____; that the said annexed will was wholly written, dated, and signed in the county ⁶ of _____, state of _____, by the said testator, in his own handwriting and by his own hand, and that the same was duly executed by the said testator on or about the _____ day of _____, 19____, at which time it bears date; and that the said decedent, at the time of executing said will, was of the age of eighteen years and upwards, was of sound and disposing mind, and not under duress, menace, fraud, or undue influence, nor in any respect incompetent to devise and bequeath his estate.

In witness whereof, I have signed this certificate and caused the same to be attested by the clerk of said court, under the seal thereof, this ____ day of ____, 19__.

____, Judge.

[Seal] Attest: ____, Clerk of the ____⁷ Court.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Title of court. 4-6. Or, city and county. 7. Title of court.

PROBATE OF WILLS.

- | | |
|---|---|
| 1. Nature of proceeding. | (2) As to identity of persons misnamed. |
| 2. Jurisdiction of courts. | (3) Wills executed by blind persons. |
| (1) In general. | (4) Presumptions as to the will. |
| (2) Prerequisites to jurisdiction. | (5) Alteration of will. Effect of. |
| (3) As to non-residents. | 8. Order or decree admitting will to probate. |
| (4) Destruction of will as affecting. | (1) In general. |
| (5) Involves power to postpone hearing. | (2) Effect of decree. |
| 3. Parties. | (3) Establishes the will prima facie. |
| (1) Who may apply for probate. | (4) Conclusiveness of decree. |
| (2) Who cannot oppose probate. | (5) Decree annulling the will. |
| 4. Notice of application for probate. | (6) Gives right to letters testamentary. |
| 5. Pleadings. | 9. Probate of after-discovered will. |
| (1) Petition for probate. | 10. Revoked will cannot be admitted to probate. |
| (2) Issues. | 11. Admission to probate under special act. |
| 6. Burden of proof. | 12. Probate of holographic will. |
| (1) In general. | 13. Costs of probate. |
| (2) Presumption of sanity. | |
| 7. Evidence. | |
| (1) Testimony of subscribing witnesses. | |

1. Nature of proceeding. The probate of a will and the administration of the estates of deceased persons, are proceedings in rem, binding upon all the world. Superior courts, while acting as probate courts, have all equity powers necessary to the completing of administration of estates, and, under our system, it is not necessary to invoke the powers of a court of chancery for any purpose within the administration: *Estate of Maxwell*, 74 Cal. 384; 16 Pac. Rep. 206, 207. Such proceedings being in rem, personal notice is not required to confer jurisdiction; constructive notice is sufficient, and the provisions of the statute providing therefor are not opposed to the requirements of the fourteenth amendment of the Federal constitution: *Estate of Davis*,

136 Cal. 590, 596; 69 Pac. Rep. 412; 151 Cal. 318; 86 Pac. Rep. 183. A hearing for the admission of a will to probate is in the nature of an action, and the order thereon is in the nature of a judgment. The heirs at law have the right to be heard. They have the right to be present at the hearing; and if they are not notified thereof, and an order is made, without giving them an opportunity to be heard, or to contest the admission of the will to probate, they stand in very much the same position as if a judgment had been rendered against them without bringing them into court. An order entered, under such circumstances, is absolutely void, and the lapse of time cannot render it valid: *In re Estate of Charlebois*, 6 Mont. 373; 12 Pac. Rep. 775, 777. A proceeding on a petition for the probate of a will is distinct from a proceeding contesting the will. The hearing of the necessary statutory evidence on the petition for probate must be heard by the court at some time, and this can properly be done as well before as after the hearing of the contest: *Estate of McDermott*, 148 Cal. 43; 82 Pac. Rep. 842, 844. Under the Oregon statute, the probate of a will is wholly an *ex parte* proceeding. After the will is admitted to probate, if any one interested wants to contest the will, he must file his complaint or allegations of contest, and thereupon the burden of proving the will is imposed on the proponent: *Malone v. Cornelius*, 34 Or. 192; 55 Pac. Rep. 536, 537. The mere nomination of an executor, without making any disposition of one's estate, or giving any other direction whatever, will constitute a will, and render it necessary that the instrument be established in the probate court: *Estate of Hickman*, 101 Cal. 609, 613; 36 Pac. Rep. 118.

REFERENCES.

Probate of wills: See notes 2 L. R. A. 795; 10 L. R. A. 95. What may be admitted to probate as a will: See note 10 L. R. A. 95. Validity of will making no disposition of property: See note 1 Am. & Eng. Ann. Cas. 368. Bill for construction of will and for directions to trustees: See note 5 L. R. A. 104-109. Probate, admission of will to, without first obtaining, by direct proceedings, annulment of letters already granted: See note 9 Am. & Eng. Ann. Cas. 962. Effect of delay in probating will: See note 57 L. R. A. 253-266. Joint and mutual wills, validity and probate of: See notes 2 Am. & Eng. Ann. Cas. 26; 38 L. R. A. 289-293. Consult notes to the following sections of *Kerr's Cal. Cyc. Code Civ. Proc.*, as to the subjects indicated: Petition and notice for probate, §§ 1299-1304; proof of nuncupative will, §§ 1290, 1291; hearing of petition for probate before a jury, when jury is demanded, verdict, judgment, etc., §§ 1313, 1314; hearing proof of will, § 1306.

2. Jurisdiction of courts.

(1) *In general.* The ordinary functions of a court of probate, acting in a proceeding for the probate of a will, are to determine two things only; viz., the testamentary capacity of the testator, acting

without restraint, and the sufficiency of the formalities observed in the execution of the instrument: *In re John's Will*, 30 Or. 494; 47 Pac. Rep. 341, 343. Under the statutes, in some states, the probate court has jurisdiction to construe wills upon the application for probate: *Siddall v. Harrison*, 73 Cal. 560, 562; 15 Pac. Rep. 130; *Estate of Hinckley*, 58 Cal. 457, 518; *In re John's Will*, 30 Or. 494; 47 Pac. Rep. 341, 344. It is questionable whether a court of equity has jurisdiction to construe a will, under the laws of the state of California: *Siddall v. Harrison*, 73 Cal. 562; 15 Pac. Rep. 130. Such a court has no jurisdiction to probate a will, and, if it cannot entertain direct jurisdiction to establish a will, it has no jurisdiction to do so as incident to jurisdiction over other matters: *McDaniel v. Pattison* (Cal.), 27 Pac. Rep. 651, 654. Until the will has been admitted to probate, the court has no power to appropriate the funds of the estate to aid either the proponent or contestant: *Estate of McKinney*, 112 Cal. 447; 44 Pac. Rep. 743, 744.

REFERENCES.

Equity declines jurisdiction over the probate of wills, and will refuse to cancel or set aside such probate on the ground of fraud or perjury: See note 106 Am. St. Rep. 643. Jurisdiction of suit for construction of will: See note 10 L. R. A. 766, 767. Probate of will, when void for want of jurisdiction: See note 33 Am. Dec. 239-243. Power of courts of probate to revoke probate of wills, or to probate additional will or codicil: See note 90 Am. Dec. 136-138. Probate court, jurisdiction of, to construe wills: See note 5 Am. & Eng. Ann. Cas. 473.

(2) **Prerequisites to jurisdiction.** A will is not sufficiently probated or proved to make it effectual to pass title to property unless it is before the court; the first and essential prerequisite to any valid act for the purpose of admitting a will to probate is to get the original instrument into court; and for this purpose, the courts are given power to resort to attachment, arrest, imprisonment, and other summary remedies: *Meyers v. Smith*, 50 Kan. 1; 31 Pac. Rep. 670, 673.

REFERENCES.

Probate of will is void for want of jurisdiction when: See note 33 Am. Dec. 239-243.

(3) **As to non-residents.** A court has jurisdiction to grant original probate of a will of a non-resident, where he has left property within this state: *Estate of Edelman*, 148 Cal. 233; 82 Pac. Rep. 962, 964; *Estate of Clark*, 148 Cal. 108; 82 Pac. Rep. 760, 761. The exercise of original jurisdiction over the estates of non-residents, affects, and can affect, only the property within the state. Therefore a judgment admitting a will to probate, in a foreign state, is valid in all other

states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extraterritorial force, establishes nothing beyond that, and does not dispense with, nor abrogate the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration: *Estate of Clark*, 148 Cal. 108; 82 Pac. Rep. 760, 772.

(4) **Destruction of will as affecting.** The destruction of a will, and, therefore, inability to prove its contents by two witnesses, as required by statute, does not take jurisdiction out of the probate court and vest the same in a court of chancery. The end and object sought to be obtained by the framers of the code was the enactment of a full, complete, and comprehensive probate procedure, in which the probate court would have exclusive power to hear and determine, no matter what may be the nature and character of the will, and no matter what may be its situation and condition: *McDaniel v. Pattison* (Cal.), 27 Pac. Rep. 651, 654.

(5) **Involves power to postpone hearing.** Jurisdiction to hear and determine a proceeding for the probate of a will, as in any cause or proceeding, involves the power to postpone, for good cause, the time of hearing, unless prohibited by positive law: *Curtis v. Underwood*, 101 Cal. 661; 36 Pac. Rep. 110, 112.

REFERENCES.

Jurisdiction of probate court over estates: See notes *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1294, 1295.

3. Parties.

(1) **Who may apply for probate.** An infant may institute a proceeding, by a next friend, for the probate of a will: *Schnee v. Schnee*, 61 Kan. 643; 60 Pac. Rep. 738. Generally speaking, the person who petitions for the probate of a will is one interested in sustaining the validity of the proffered instrument, but it is by no means necessary that he should be such person. The purpose of the petition is to give jurisdiction to the court, and jurisdiction having been obtained, it becomes the duty of the court, with or without contest, to take all necessary and proper evidence to the end of determining whether or not it be a legal expression of a testamentary intent: *Estate of Edwards* (Cal.), 97 Pac. Rep. 23, 24. A person named as executor and legatee is a proper party to petition for the probate of a will: *Estate of Olmstead*, 120 Cal. 447, 451; 52 Pac. Rep. 804. A creditor, though not a person interested in upholding a will, may petition for its probate: *Estate of Edwards* (Cal.), 97 Pac. Rep. 23, 24. The court may permit both the proponent and contestant, on an application for the probate of a will, to offer testimony, both of the attesting and other

witnesses, as to the testamentary capacity of the deceased at the time of the alleged execution of the will: *In re Robb*, 12 Col. App. 489, sub nom. *In re D'Avignon's Will*, 55 Pac. Rep. 936. Upon the hearing of the petition for probate, the matter of the appointment of an attorney for absent heirs, and the allowance to him of a fee, are matters entirely within the discretion of the probate court. If such allowance be improvident or indiscreet, the court may vacate it, at the suggestion of any one, or upon its own motion: *Estate of Rety*, 75 Cal. 256; 17 Pac. Rep. 65.

REFERENCES.

What persons are bound by probate, and refusal of probate, of wills: See note 60 Am. Dec. 353-361.

(2) **Who cannot oppose probate.** A stranger and a trespasser will not be permitted to question the will of a decedent, where the same is not questioned by the heirs named therein: *Cullen v. Bowen*, 36 Wash. 665; 79 Pac. Rep. 305. The law will not permit a legatee to accept, first, a legacy under a will, with full knowledge of the circumstances, and afterwards to attack its sufficiency, upon tendering back what he had received. In such a case, the legatee is estopped from raising the question of the insufficiency of the attestation and probate of the will: *Lanning v. Gay* (Kan.), 85 Pac. Rep. 407, 408. A public administrator has no interest in the estate of a decedent that entitles him to object to the probate of the will: *State v. District Court*, 34 Mont. 226; 85 Pac. Rep. 1022, 1023. See also *Estate of Sanborn*, 98 Cal. 103; 38 Pac. Rep. 165.

REFERENCES.

Who may oppose the probate of a will: See note 68 Am. Dec. 447, 448.

4. Notice of application for probate. Personal service of copies of the notice of the time and place for probating a will is equivalent to service by mailing: *Estate of Hamilton*, 120 Cal. 421, 430; 52 Pac. Rep. 708. Where notice of the time and place of probating a will is given, the failure to adjourn the hearing, from time to time, and to give a new notice for a later day, when the matter was in fact taken up, is, at most, only an irregularity, occurring after jurisdiction had been acquired: *Estate of Warfield*, 22 Cal. 51; 83 Am. Dec. 49; *Estate of Davis* (Cal.), 86 Pac. Rep. 183, 185. A statute relative to the notice to be given for the application for the probate of a will, is not invalid as to non-residents who have no actual notice, where, although notice could not reach all such non-residents interested before probate, a further provision of the statute gives the right to contest probate at any time within one year after probate: *Tracy v. Muir*, 151 Cal. 363; 90 Pac. Rep. 832, 834. A code provision which relates exclusively to publication by state officers, and com-

missioners, common councils, boards of trustees, or supervisors, in counties, cities, cities and counties, or towns, is inapplicable to the provisions of the code relating to publication of notice of hearing for the probate of wills: *Estate of Melone*, 141 Cal. 331, 333; 74 Pac. Rep. 991. The statute which provides for only ten days' notice to non-resident heirs, of the hearing of an application for the probate of a will, is not unconstitutional on the ground that the period is too short, and that the heir is therefore deprived of his property "without due process of law." Neither does such statute violate the Federal constitution because it requires personal notice to known heirs, residents of the state, while as to non-resident heirs, no personal notice is demanded. The rights of the non-resident heirs are in no way concluded by the decree of probate. They have an entire year thereafter in which to attack the will, and they may attack it upon the same grounds, and for the same reasons, that they could have attacked it prior to its probate. Public policy demands that a will shall have a speedy probate, and the legislature, recognizing that fact, has given the heir, by express enactment, one year after such probate has been decreed within which to attack the will: *Estate of Davis*, 136 Cal. 590, 596; 69 Pac. Rep. 412; 151 Cal. 318; 86 Pac. Rep. 183.

5. Pleadings.

(1) **Petition for probate.** No particular form of petition is prescribed to invoke the action of the court to the probate of a will. All that is necessary, is to exhibit the will for probate with such proof as shows that the testator is deceased, and that he was, at the time of his death, a resident of the county. A verification of the petition, if required, is waived if no objection is taken to a want of verification: *Moore v. Willamette T. & L. Co.*, 7 Or. 359, 367. Under the present procedure in California, a petition is necessary to confer upon the court jurisdiction to probate a will: *Estate of Edwards* (Cal.), 97 Pac. Rep. 23, 24; though, under the earlier probate procedure of that state, no petition was required: *Estate of Howard*, 22 Cal. 395. It is not required that the petition for the probate of a will be verified: *Estate of Edwards* (Cal.), 97 Pac. Rep. 23, 24.

(2) **Issues.** The issues, upon an offer of a will for admission to probate are, whether the will was duly attested and executed, and whether the testator at the time of executing the same was of full age and of sound mind and memory, and not under any restraint. The burden of proving these things rests upon the proponent of the will: *Bethony Hospital Co. v. Hale*, 69 Kan. 616; 77 Pac. Rep. 537, 538. In the probating of a will, whatever may be the form of procedure, or in whatever court the proceedings may be had, only one ultimate fact is to be ascertained and determined, — was the writing the last will of the testator, as it purported to be: *In re D'Avignon's Will*, 12 Col.

App. 489; 55 Pac. Rep. 936, 937. The Kansas statute, providing that any person, interested in having the application for the probate of a will denied, may demand the right to have his witnesses examined in opposition, does not change or enlarge the issues involved, so as to authorize a contest of the will in the probate court: *Wright v. Young*, 75 Kan. 287; 89 Pac. Rep. 694, 696.

6. Burden of proof.

(1) **In general.** The burden of proof is primarily upon the proponent of a will, to show its execution in accordance with the requirements of the law, and that the instrument is the free and voluntary act of the testator. Likewise, the burden of proof to show undue influence, is upon the one who asserts it: *Snodgrass v. Smith* (Col.), 94 Pac. Rep. 312, 313. While the burden of proof rests upon the proponent of a will to establish its validity, only a prima facie showing is required to authorize a will to be admitted to probate: *McConnell v. Keir* (Kan.), 92 Pac. Rep. 540, 541. It is incumbent upon the proponent of a will to make satisfactory proof thereof, and, if he fails to do this to the satisfaction of the trial court, it is the duty of the court, even without opposition, to refuse probate to the purported will: *Estate of Hayden* (Cal.), 87 Pac. Rep. 275, 276. Where a will has been probated "in common form," or by proceedings wholly ex parte, as in this case, and the validity of the will is attacked by a direct proceeding, it is incumbent upon the person seeking to maintain the validity of the will to probate the same de novo, by original proof, in the same manner as if no probate thereof had ever been had. In every such proceeding, the onus probandi lies upon the party propounding the will; and he must prove every fact that is not waived or admitted by the pleading, necessary to authorize its probate in the county court: *Hubbard v. Hubbard*, 7 Or. 42, 44.

(2) **Presumption of sanity.** The general rule that all persons are presumed sane until the contrary appears does not apply in proceedings for the probate of a will. There must be sufficient proof to make out a prima facie case of the sanity of the testator, at the time the will was made, as one of the jurisdictional facts: *In re Baldwin's Estate*, 13 Wash. 666; 43 Pac. Rep. 934, 935.

7. Evidence.

(1) **Testimony of subscribing witnesses.** The question as to whether the testator was conscious and possessed of testamentary capacity, should be determined from the facts and circumstances surrounding the transaction. The fact that subscribing witnesses gave testimony tending to weaken the force of the attestation of the will, does not invalidate the same, nor is it conclusive as to the testamentary capacity of the testator. The will may be established even in opposi-

tion to the testimony of such witnesses: *In re Shapter's Estate*, 35 Col. 578; 85 Pac. Rep. 688, 691; *Trustees of Auburn Cemetery v. Calhoun*, 25 N. Y. 422. It is not necessary that the testator give an express direction where the will is authenticated, apparently, both by the mark of the testator (he being unable to write), and the name of the testator. The direction to write his name may be proved by the circumstances: *Pool v. Buffman*, 3 Or. 428, 441. A probate judge, on hearing testimony as to the execution of a will, is not bound to accept the testimony of witnesses to the execution, but may pass upon it, and the credibility of the witnesses, as in other cases; and, if all the evidence, circumstances, facts, and probabilities in the case convince him that certain testimony is not credible, it is his duty to disregard it: *Estate of McDermott*, 148 Cal. 43; 82 Pac. Rep. 842, 843. The husband of a legatee in a will is a competent witness to its execution in a proceeding in the probate court to establish the will. Such a proceeding is not in the category of a civil action, but may be classed as a special proceeding, although the latter is not defined by the statute: *Lanning v. Gay*, 70 Kan. 353; 78 Pac. Rep. 810. The mental capacity of the testator is to be tested as of the date of the execution of the will, and other things being equal, the evidence of the attesting witnesses, and next to them, all those present at the execution, is to be most relied upon: *In re Pickett's Will (Or.)*, 89 Pac. Rep. 377, 382. See *Chrisman v. Chrisman*, 16 Or. 127; 18 Pac. Rep. 6. Where the statute requires three witnesses to a will or codicil, the probate judge has no power to admit a codicil to probate that was attested by only two witnesses: *Perea v. Barela*, 6 N. M. 239, sub nom. *Garcia y Perea v. Barela*, 27 Pac. Rep. 507, 508.

REFERENCES.

Proof of signature by mark when attesting witnesses are dead or cannot remember: See note 44 L. R. A. 142-147. Evidence as to testamentary capacity: See notes 36 L. R. A. 66-68; 36 L. R. A. 724-726. Weight of testimony of subscribing witness against competency of testator: See note 6 L. R. A. (N. S.) 575-577. Subscribing witnesses to be produced and examined upon hearing for petition for probate, — failure to produce, effect of: See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1315.

(2) **As to identity of persons misnamed.** The identity of persons misnamed in wills may be ascertained by parol evidence of facts and circumstances: *Wilson v. Stevens*, 59 Kan. 771; 51 Pac. Rep. 903, 904. The subject of the testator's bounty may be ascertained by parol, if not sufficiently expressed in the instrument. For the purpose of determining the object of his bounty, or the subject of disposition, or the quantity of interest intended to be given by his will, the court may inquire into every material fact relating to the person who claims to

be interested under the will, as to the property which is claimed to be the subject of disposition, and the circumstances of the testator and of his family and affairs: *Smith v. Holden*, 58 Kan. 535; 50 Pac. Rep. 447, 449.

(3) **Wills executed by blind persons.** It is not absolutely required, in the proof of wills executed by blind persons, that the witnesses should be able to depose that the testator was cognizant of the contents of the paper, which he declares to be his will, and desires the witnesses to attest. But where the evidence shows, conclusively, that the will was read over to such testator by his trusted attorney on the same day, and shortly before its execution, and that the terms of the will were in conformity with the wishes of the testator, as expressed by him to his attorney some time before that, the proponents, in such a case, are not reduced to the extremity of having to rely upon merely a *prima facie* case as to the due execution of the will: *In re Pickett's Will* (Or.), 89 Pac. Rep. 377, 382.

(4) **Presumptions as to the will.** The legal presumption is that when a will has been executed in conformity with the requirements of the statute relating to wills, it continues to exist until the death of the testator: *Caeman v. Van Harke*, 33 Kan. 333; 6 Pac. Rep. 620.

(5) **Alteration of will. Effect of.** An alteration of a will ought not to raise a presumption against the instrument, because the law never presumes wrong. The question as to the time of alteration, is, in the last instance, one for the court or jury. It is, like any other fact in the case, to be settled by the trier or triers of the facts: *Scott v. Thrall* (Kan.), 95 Pac. Rep. 563, 564.

8. Order or decree admitting will to probate.

(1) **In general.** A will cannot be admitted to probate as to one part, and denied probate as to the remainder: *Estate of Pforr*, 144 Cal. 121; 77 Pac. Rep. 825. If the county court, in a proceeding for the probate of a will, makes and files findings and conclusions, and subsequently makes and files a separate document purporting to be the judgment, this so-called judgment should be regarded as a completion or amendment of the previous document containing the findings, and both documents, taken together, constitute the final decree: *In re Lemery's Estate* (N. D.), 107 N. W. Rep. 365. An order, upon a motion to vacate an order admitting a will to probate, where the motion was not made within the time prescribed by the statute, is, where allowed, erroneous and void, unless the order admitting the will to probate was itself void on its face: *Estate of Dunsmuir*, 149 Cal. 67; 84 Pac. Rep. 657.

(2) **Effect of decree.** An order admitting a will to probate, though made in an informal manner, is as binding and conclusive as though made in a formal manner. Real estate passes under the will, upon such admission to probate, and does not descend to the heirs of the testator: *Chandler v. Richardson*, 65 Kan. 152; 69 Pac. Rep. 168, 170. Under the system, as it exists in the state of California, for the admission of wills to probate, the determination of the question of genuineness of an instrument purporting to be a will, is solely and exclusively for the court to which the proof of wills is committed, and its decision therein is final and conclusive; and, in the absence of state law, statutory or customary, providing otherwise, such decision is not subject, except on appeal to a higher court, to be questioned in any other court, or to be set aside or vacated by a court of chancery on any ground: *Tracy v. Muir*, 151 Cal. 363; 90 Pac. Rep. 832; *O'Callaghan v. O'Brien*, 199 U. S. 89; 25 Sup. Ct. Rep. 727; 50 L. ed. 101; *Broderick's Will Case*, 21 Wall. (U. S.), 503; 20 L. ed. 599; *State v. McGlynn*, 20 Cal. 233, 266; 81 Am. Dec. 18; *Langdon v. Blackburn*, 109 Cal. 19; 41 Pac. Rep. 814. The effect of a valid probate of a will devising real estate, until such probate is duly set aside, or the will declared void in appropriate proceedings is, at least, to confer upon the executor constructive possession of all the real estate devised until the estate is settled, and, where a trust is created, to confer the same upon the trustee of the devisees until the trust is fully performed. Plaintiffs, therefore, in an action which they bring to quiet their title as the result of the obtaining of a decree declaring the will void, cannot be heard to say that, as heirs, they are constructively in possession of the real estate devised in the will. The allegation of their complaint that they are in possession as heirs at law is controlled by other allegations of the complaint which show that the possession which the plaintiffs must have in order to maintain their action is in one of the defendants as trustee. Such an action resolves itself into an action to overthrow, not to construe, the will, and cannot be maintained under the statute: *Chilcott v. Hart*, 23 Col. 40; 45 Pac. Rep. 391, 392, 393. The decision of a probate court admitting a will to probate cannot be impeached on collateral attack, even though the will be void: *Ward v. Board of Commissioners*, 12 Okl. 267; 70 Pac. Rep. 378, 382.

REFERENCES.

Probate of will, when conclusive: See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1333.

(3) **Establishes the will prima facie.** A probated will is prima facie valid: *Scott v. Thrall* (Kan.), 95 Pac. Rep. 563, 565. The formal admission of a will, upon the evidence of the subscribing witnesses, establishes a prima facie case in favor of its validity; but it is

merely a prima facie case: *Rathjens v. Merrill*, 38 Wash. 442; 80 Pac. Rep. 754, 756. Under the Kansas statute of wills, the order of probate determines the due attestation, execution, and validity of the will; and, in the absence of a contest within the appointed time, it is forever binding, except as to those under legal disability: *Keeler v. Lauer*, 73 Kan. 388; 85 Pac. Rep. 541, 544.

(4) **Conclusiveness of decree.** Where a will was probated under the Spanish and Mexican laws, in territory formerly belonging to Mexico, and such probate was in accordance with the law existing at that time and prevailing in that jurisdiction, the probate must be recognized and admitted in all courts as valid and conclusive; and an application made more than twenty years after the filing of the petition in the probate court to probate the will again, in accordance with the laws then in vogue, will not be entertained: *Bent v. Thompson*, 5 N. M. 408; 23 Pac. Rep. 235, 239. If a court, having jurisdiction, admits a will to probate, the fact of the execution thereof by the testator cannot be called in question, and, if the decree is not vacated on appeal, or successfully impeached in some known and recognized legal method, the decree is final and conclusive upon all persons: *Jones v. Dove*, 6 Or. 188, 191.

REFERENCES.

Conclusiveness of probate as res judicata: See note 21 L. R. A. 680-689. Probate judgments, conclusiveness of: See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1908, pars. 13-15.

(5) **Decree annulling the will.** A will cannot be annulled in part; it must be annulled in its entirety, or not at all: *Estate of Freud*, 73 Cal. 555, 557; 15 Pac. Rep. 135; *Estate of Pforr*, 144 Cal. 121; 77 Pac. Rep. 825; *Estate of Dolbeer*, 149 Cal. 227, 246; 86 Pac. Rep. 695.

(6) **Gives right to letters testamentary.** The naming of an executor is ordinarily a part of a will, and, in the absence of any objection to his competency, an order admitting a will to probate includes a right to have letters testamentary issued to him. Under a statute by which administration may be granted to one or more competent persons, a devisee or other person interested in the estate, is not entitled to the right to nominate an administrator with the will annexed: *Estate of Richardson*, 120 Cal. 344; 52 Pac. Rep. 832, 833.

9. **Probate of after-discovered will.** Where an administrator is appointed, on the theory that the deceased died intestate, it is the duty of the court, upon the subsequent production and proof of a will, to immediately revoke the administration previously granted, and

to issue letters testamentary to the executor named in the will. The administrator, in such case, is not entitled to notice of the intended probate of the will: *Malone v. Cornelius*, 34 Or. 192; 55 Pac. Rep. 536, 538.

10. **Revoked will cannot be admitted to probate.** Where a testator, during marriage, gave all of his property to his wife and her son, but the wife died, and he married again, and died without having made any other will, leaving his second wife surviving, and no issue by either marriage, the will is unqualifiedly revoked, under a statute which provides that if, after making a will, the testator marries, and the wife survives the testator, the will is revoked. The will, under such facts and circumstances, cannot be admitted to probate: *In re Larsen's Estate*, 18 S. D. 335; 100 N. W. Rep. 738, 739.

11. **Admission to probate under special act.** Attesting witnesses to a will are required to prevent the setting up of fictitious wills against heirs and representatives. An unattested paper may, however, where the state alone is interested, be admitted to probate under a special act providing that this be done "the same as though it was executed in conformity with the general law": *Estate of Sticknorth*, 7 Nev. 223, 234.

12. **Probate of holographic will.** A petition for the probate of a holographic will is not required to state whether the will is holographic, or any other species of will: *Estate of Learned*, 70 Cal. 140, 142; 11 Pac. Rep. 587.

REFERENCES.

Holographic wills, how proved: See note *Kerr's Cal. Cyc. Code Civ Proc.*, § 1309.

13. **Costs of probate.** In a proceeding to probate a will, the costs are taxable against the estate, not against the person who had possession of the will, and who presented it for probate: *Blackman v. Edsall*, 17 Col. App. 429; 68 Pac. Rep. 790, 791. Any ordinary and reasonable expenses incurred by an executor in probating a will, even if contested, are expenses of administration, which are chargeable to the estate: *Notley v. Brown*, 16 Haw. 575, 578.

CHAPTER II.

CONTESTING PROBATE OF WILLS.

- § 985. Contestant to file grounds of contest, and petitioner to reply.
- § 986. Form. Opposition to probate of will and codicils, for unsoundness of mind, fraud, etc.
- § 987. Form. Contest, on various grounds, of probate of will.
- § 988. Form. Petition by public administrator, for letters of administration, and contest of probate of will.
- § 989. Form. Demurrer to contest of probate of will.
- § 990. Form. Answer to contest of probate of will.
- § 991. Form. Demand for jury on contest of probate of will.
- § 992. How jury obtained and trial had.
- § 993. Verdict of the jury. Judgment.
- § 994. Examination of witnesses. Proof of handwriting.
- § 995. Testimony reduced to writing for future evidence.
- § 996. Certificate of proof of will.
- § 997. Form. Certificate of proof of will, and facts found. (Two witnesses.)
- § 998. Form. Certificate of rejection of will.
- § 999. Will and proof to be filed and recorded.
- § 1000. Form. Order admitting will to probate and for letters testamentary (with or without bond).
- § 1001. Form. Shorter order admitting will to probate and for letters testamentary (with or without bond).
- § 1002. Form. Order admitting will to probate and for letters of administration with the will annexed.

CONTEST OF PROBATE.

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| 1. Nature of proceeding. | 6. Pleadings. |
| 2. Jurisdiction. | (1) In general. |
| (1) In general. | (2) Unsoundness of mind. |
| (2) Mandate to restore contest. | (3) Undue influence. |
| 3. Parties. | 7. Issues. Jury trial of. |
| (1) In general. | 8. Burden of proof. |
| (2) Who may not contest. | (1) In general. |
| (3) Duty of executor to defend. | (2) On issue of insanity. |
| 4. Time of contest. In general. | 9. Evidence. |
| 5. Grounds of contest. | (1) In general. |
| (1) On ground of invalid execution. | (2) On issue of insanity. |
| (2) Insanity. | (3) Suicide. Effect of, as evidence. |
| (3) Undue influence. | (4) Of undue influence. |
| (4) Fraud, etc. | |

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| (5) Testimony of "intimate acquaintances." | 11. Findings and verdict. |
| (6) Testimony of "casual observers." | (1) Effect of findings. |
| (7) Expert witnesses. | (2) Directing a verdict. |
| (8) Physician as witness. | (3) Mistrial. |
| (9) Non-experts. | (4) New trial. |
| (10) Testimony of wife as to husband's mental condition, etc. | 12. Appeals. |
| (11) Communications with attorneys. | (1) In general. |
| (12) Declarations of legatees, etc. | (2) Notice of appeal. |
| (13) Declarations of testator. In general. | (3) Settlement of statement. |
| (14) When declarations of testator are incompetent. | (4) Jurisdiction on appeal. |
| (15) Jury as judges of weight of evidence. | (5) Record. |
| 10. Instructions to jury. | (6) Parties. Who entitled to appeal. |
| | (7) Time of appeal. |
| | (8) Consideration on appeal. |
| | (9) Review of verdict or findings. |
| | (10) Direct and collateral attack. |
| | (11) Effect of appeal as to executor's powers. |
| | 13. No review in equity. |

§ 985. Contestant to file grounds of contest, and petitioner to reply. If any one appears to contest the will, he must file written grounds of opposition to the probate thereof, and serve a copy on the petitioner and other residents of the county interested in the estate, any one or more of whom may demur thereto upon any of the grounds of demurrer provided for in part two, title six, chapter three of this code. If the demurrer is sustained, the court must allow the contestant a reasonable time, not exceeding ten days, within which to amend his written opposition. If the demurrer is overruled, the petitioner and others interested may jointly or separately answer the contestant's grounds, traversing, or otherwise obviating or avoiding the objections. Any issues of fact thus raised, involving:

1. The competency of the decedent to make a last will and testament;
2. The freedom of the decedent at the time of the execution of the will from duress, menace, fraud, or undue influence;
3. The due execution and attestation of the will by the decedent or subscribing witnesses; or,
4. Any other questions substantially affecting the validity of the will;

— Must, on request of either party in writing (filed three days prior to the day set for the hearing), be tried by a jury. If no jury is demanded, the court must try and determine the issues joined. On the trial, the contestant is plaintiff and the petitioner is defendant. **Kerr's Cyc. Code Civ. Proc.**, § 1312.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1612.
Colorado. 3 Mills's Ann. Stats., secs. 4679, 4688.
Idaho.* Code Civ. Proc. 1901, sec. 4007.
Kansas. Gen. Stats. 1905, § 8690.
Montana.* Code Civ. Proc., sec. 2340.
Nevada. Comp. Laws, sec. 2803.
North Dakota. Rev. Codes 1905, §§ 8003, 8006.
Oklahoma. Rev. Stats. 1903, sec. 1498.
South Dakota. Probate Code 1904, § 46.
Utah. Rev. Stats. 1898, sec. 3791.
Wyoming. Rev. Stats. 1899, sec. 4602.

§ 986. Form. Opposition to probate of will and codicils for unsoundness of mind, fraud, etc.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 { [Title of form.]

That the deceased, at the date of the making of said pretended will, and at the dates of the making of the alleged codicils thereto, was incompetent to make said or any will, or to make either or any of the alleged codicils;

That said pretended will is not the will of said deceased;

That at the time of the alleged signing of said pretended will, and of the several alleged codicils thereto, said deceased was laboring under, and had, an insane delusion as to said contestant;

That at the time of the alleged signing of said pretended will, and of the said several alleged codicils thereto, said deceased, —, was not of sound and disposing mind;

That at the time of the alleged signing of said pretended will, and of the said several alleged and pretended codicils thereto, said deceased was, and had been, habitually intem-

perate from the excessive use of intoxicating liquors, and was thereby, and by reason thereof, incapacitated from executing said pretended will, or either or any of the said alleged codicils thereto;

That said deceased, at the time of the signing of the said alleged and pretended will, and of the said several alleged codicils thereto, was laboring under insane delusions, by reason of habitual intoxication, produced by the excessive use of intoxicating wines and other liquors;

That said pretended will and the several alleged codicils thereto are, and each of them is, void;

That said pretended will and the said several alleged codicils thereto were not, nor has any or either of them ever been signed by said deceased at a time when he was of sound and disposing mind;

That at the time of the alleged signing of said pretended will, and of the said several codicils thereto, by said deceased, he was under undue influence, and was prejudiced against said contestant;²

That said pretended will, and the said several pretended codicils thereto are, and each of them is, void, because the pretended bequests therein mentioned are not certain, either as to the objects or definiteness of amount, but are discretionary and not susceptible of enforcement;

That said pretended will and the said several alleged codicils thereto are, and each of them is, uncertain and indefinite as to the powers and duties of the several trustees therein named;

That the duties and powers of the persons named in said pretended will, and of the said several alleged codicils thereto, are too indefinite and uncertain to authorize their enforcement by any court;

That the said instrument in writing was obtained, and the execution thereof procured, by fraud and circumvention and undue influence practiced upon the decedent by — and —, or one of them, in this, namely, —; ³

That said instrument in writing was not freely and voluntarily executed or made as the last will of said decedent,

but that the subscription thereto, and publication thereof, by him, the said decedent, were procured by fraud and coercion exercised upon him by — and —, or one of them, in this, namely, —.⁴ —, Contestant.

Explanatory notes. 1. Give file number. 2. State the facts relied on as constituting undue influence, prejudice, etc. 3, 4. State facts constituting the alleged fraud, undue influence, coercion, etc.

§ 987. Form. Contest, on various grounds, of probate of will.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

Now comes —, and files this, his contest² of and objections to the admission to probate of the instrument filed herein on the — day of —, 19—, purporting to be the last will; and codicil thereto, of the above-named decedent, and for grounds of contest and objection to the admission to probate of said instrument avers as follows, to wit:

First Ground of Contest.³

I.

That the said —, said decedent, left surviving him, his widow, to wit, —, and five children, to wit, —, who is this contestant, —, —,⁴ formerly —, —, and —, all of whom are of full and lawful age, and reside in said county⁵ of —.

II.

That this contestant, —, is a son of said decedent and one of his heirs at law, and entitled to share in the distribution of his estate if said — died intestate.

III.

That at the time when the said —, in form executed the said purported and pretended will and codicil thereto, he, the said —, now deceased, was not of sound mind.

Second Ground of Contest.⁶

I.

(Repeat allegations of first paragraph in the first ground of contest.)

II.

(Repeat allegations of second paragraph in the first ground of contest.)

III.

That this contestant is informed and believes, and upon such information and belief avers, that the said instruments purporting to be the will of said deceased and his codicil thereto, were not, nor was either of them, executed in the manner or form required by law in this:

That the said purported will was not signed by the said — in the presence of — and —, whose names purport to be signed as witnesses thereto, nor either of them, and that the names of the said purported witnesses to said will were not signed nor was either of them signed thereto by the said witnesses respectively at the request of the said —, or in his presence, nor did the said — declare the same to be his will in the presence of said witnesses, or either of them;

That the said purported codicil was not signed by the said — in the presence of — and —, whose names purport to be signed as witnesses thereto, or of either of them, and that the names of the said — and — were not subscribed thereto by them respectively, or by either of them, at the request of the said —, or in his presence, nor did he declare said purported codicil to be the codicil to said will in the presence of said witnesses, or either of them.

Third Ground of Contest.

I.

(Repeat allegations of first paragraph in the first cause of action.)

II.

(Repeat allegations of second paragraph in the first cause of action.)

III.

That the execution in form of said alleged will and codicil, if the same were executed by the said — at all, was procured by the undue influence of his wife, the said —, and that the facts constituting such undue influence are as follows:

That for a long time, to wit, about — years prior to his death, the said — was and thereafter, and until the time of his death, continued to be, afflicted with disease of both body and mind, and by reason thereof he became and was weak and ill both in body and mind, and his mind was so weakened that he became childish and was unable at times to talk or to knowingly understand the ordinary affairs of life, or to understand or to transact business;

That while the said — was in such condition of body and mind he was incapable of properly taking care of himself and was in constant need of the care and attention of some other person to see that his wants were properly administered to, and during all of said period he resided with, and was taken care of by, his said wife, —, at their home in the county of —, state of —, and was entirely dependent upon her for the care and attention of which he was in need by reason of his disease of body and mind as aforesaid;

That by reason of the said diseased condition of body and mind of the said —, and by reason of his being dependent upon his said wife for the care and attention of which he was in need, as aforesaid, his said wife, —, acquired and had, at the time of the said formal execution of said purported will, and at the time of the said formal execution of the said purported codicil, a great and controlling influence over the mind and will of the said —, and was thereby able to and did direct and dictate to him what he should do in matters relating to his property;

That while the said — was in the said condition of body and mind, as aforesaid, and while he was so, as aforesaid, in the care of and under the domination and control of the said —, she, the said —, with the intent and for the purpose of procuring the said — to execute the said purported will and codicil, taking an undue and unfair advantage of his said condition and of her domination and control over him as aforesaid, and taking a grossly oppressive and unfair advantage of his necessities and distress of mind and body, at and many times before the time of the

formal execution of said purported will, and at and many times before the time of the formal execution of said purported codicil, did state to the said — that his children were spendthrifts, and would not and could not preserve or take care of any property which they might receive from his estate at his death, and that his said children had no filial affection for him, and were anxiously awaiting his death to obtain his property and squander the same, and did demand of the said — that he should will and devise all of his property to her, the said —, and did threaten him that if he did not will and devise all of his property to her, the said —, she would cause him great trouble in his lifetime, and would cause him to be adjudged an incompetent person and cause a guardian to be appointed for his person and estate, and that a large part of his entire estate would be dissipated in litigation;

That by means of the said statements, threats, and demands of the said —, hereinbefore alleged, she, the said —, did so prevail upon and influence the said —, in his then weakened condition of mind and body, both at a time of the alleged execution of said purported will and at the time of the alleged execution of said purported codicil thereto, that the said — did, against his will and wish, in form execute the said purported will and the said purported codicil thereto;

That all of the said statements so made by said — to said — were untrue and were known by her at the time they were made to be untrue, and the same were made by her for the purpose of prejudicing, and did prejudice the said — against his said children;

That the said —, by reason of his condition of mind and body as aforesaid, at the time of the said formal execution of said purported will, and at the time of the said formal execution of said purported codicil thereto, was unable to resist the said undue influence of the said — hereinbefore alleged, and being then and there under the domination and control of the said —, as aforesaid, and by reason of the said undue influence of the said —, hereinbefore alleged, as aforesaid, did in form make and execute

the said alleged will and the said alleged codicil, if the same were ever or at all made or executed by him;

That if the said — had been free from the said undue influence of the said — hereinbefore alleged, he would not in form, or in any wise, have made or executed the said alleged will, or the said alleged codicil thereto.

Fourth Ground of Contest.*

I.

(Repeat allegations of first paragraph in the first cause of action.)

II.

(Repeat allegations of second paragraph in the first cause of action.)

III.

That this contestant is informed and believes, and upon such information and belief alleges, that the execution in form of said alleged will and codicil, if the same were executed by the said — at all, was procured by and through the fraud of his said wife, —, and that the facts constituting such fraud are as follows:

That at and before the time of the formal execution of said purported will by the said —, if the same was executed, and at and before the time of the formal execution of said purported codicil by the said —, if the same was executed, the said —, with intent to deceive the said —, and to induce him to execute the said purported will and codicil, promised to the said —, that if he, the said —, would will and devise all of his property to her, the said —, with the exception of a nominal sum to each of his said children as in said purported will provided, she, the said —, could and would, after his death, divide all the property so willed and devised to her, equally and proportionately among all of his said children and herself according to the laws of inheritance of the state of —;

That the said —, believed and relied upon the said promise, and was by said promise induced to execute the said purported will and codicil, if the same were in fact executed; that the said — would not, in form, or at all,

have executed the said purported will or codicil if the said promise had not been made; and that the said promise upon the part of the said — was made by her without any intention on her part of ever performing it.

Wherefore the said —,° prays that the said instrument purporting to be the will and codicil thereto of the said —, deceased, be refused and denied probate, and that he have such other and further relief as he may be entitled to.

— and —, Attorneys for the Contestant, —.

[Add usual verification.]

Explanatory notes. 1. Give file number. 2. In case an amended contest is filed, say; Now comes —, and, by leave of court first had and obtained, files this first amended contest, etc. 3. Unsoundness of mind. 4. Where female children have married, give both family and married names. 5. Or, city and county. 6. Non-execution of will. 7. Undue influence of wife. 8. Fraud of wife. 9. Contestant.

§ 988. Form. Petition by public administrator for letters of administration, and contest of probate of will.

[Title of court.]

[Title of estate.] { No. —¹ Dept. No. —
[Title of form.] }

To the Honorable the —² Court of the County³ of —, State of —.

The petition of —, of the county⁴ of —, state of —, respectfully shows:

That — died on or about the — day of —, 19—, at —;⁵

That said deceased at the time of his death was a resident of the county⁶ of —, state of —, and left property in the said county⁷ of —, state of —, of the probable value of — dollars (\$—), but the character of which your petitioner is not able at this time to give;

That the names, ages, and residences of the heirs of said decedent, so far as known to your petitioner are as follows, to wit, —

Names.	Approximate ages.	Residences.
—	—	—
—	—	—

That no administrator has been appointed to take charge of said estate, and that in consequence thereof, it is being wasted, uncared for, and lost;

That your petitioner is the public administrator of the said county ^a of —, state of —, and, as such, is entitled to letters of administration upon the estate of said deceased, and prays for issuance of the same to him.

And, in opposition to the petition for the probate of a certain instrument in writing, filed in said court on the — day of —, 19—, and which purports to be the last will of —, the said deceased, your petitioner alleges:

That said written instrument is not the will of said —;

That it was not signed by the said —, or by anyone authorized to sign it for him, the said —; and

That, at the time said purported will is alleged to have been signed, the pretended testator was not of sound and disposing mind,^o and had no power to make a will.

—, Attorney for Petitioner. —, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, city and county. 5. State place. 6-8. Or, city and county. 9. Or, was dead.

§ 989. Form. Demurrer to contest of probate of will.

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

Now comes —, the petitioner for the probate of the last will of —, deceased, and for the issuance to him of letters testamentary thereon, and for demurrer to the contest of —, filed herein by —, the public administrator, opposing the probate of said last will alleges:

That said contestant is not a devisee, legatee, heir at law, or other person interested in said estate, and therefore has not legal capacity to contest the probate of said will;

That the said contest so filed herein as aforesaid does not state facts sufficient to constitute a ground of opposition to said will.

Wherefore proponent prays that said contest be dismissed.

—, Attorney for Proponent.

Explanatory note. 1. Give file number.

§ 990. Form. Answer to contest of probate of will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

For answer to the contest of the probate of the last will of ____, deceased, filed herein by ____, the proponent of said will, ____, now comes, and denies and avers as follows: ____.²

Wherefore proponent prays that said contest be dismissed; that said instrument be admitted to probate as the last will of ____, deceased; and that proponent herein recover his costs. ____, Attorney for Proponent.

Explanatory notes. 1. Give file number. 2. Make denials and averments as in ordinary civil actions.

§ 991. Form. Demand for jury on contest of probate of will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

____, the contestant² in the above-entitled matter demands that the issues herein arising upon the petition of ____, contesting the probate of the last will of said ____, deceased, and the answer to said petition, be tried by a jury.

Dated ____, 19____. ____, Attorney for Contestant.³

Explanatory notes. 1. Give file number. 2, 3. Or, petitioner for probate.

§ 992. How jury obtained and trial had. When a jury is demanded, the superior court must impanel a jury to try the case, in the manner provided for impaneling trial juries in courts of record, and the trial must be conducted in accordance with the provisions of part two, title eight, chapter four, of this code. A trial by the court must be conducted as provided in part two, title eight, chapter five of this code. **Kerr's Cyc. Code Civ. Proc.**, § 1313.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1613.**Colorado.** 3 Mills's Ann. Stats., sec. 4679.

Idaho. Code Civ. Proc. 1901, sec. 4008.

Montana.* Code Civ. Proc., sec. 2341.

Nevada. Comp. Laws. sec. 2803.

Oklahoma. Rev. Stats. 1903, sec. 1499.

South Dakota. Probate Code 1904, § 47.

Wyoming. Rev. Stats. 1899, sec. 4603.

§ 993. **Verdict of the jury. Judgment.** The jury, after hearing the case, must return a special verdict upon the issues submitted to them by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will is admitted to probate, the judgment, will, and proofs must be recorded. **Kerr's Cyc. Code Civ. Proc., § 1314.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1614.

Colorado. 3 Mills's Ann. Stats., sec. 4683.

Idaho.* Code Civ. Proc. 1901, sec. 4009.

Montana.* Code Civ. Proc., sec. 2342.

Nevada. Comp. Laws, secs. 2803, 2805.

Oklahoma. Rev. Stats. 1903, sec. 1499.

South Dakota. Probate Code 1904, § 47.

Wyoming. Rev. Stats. 1899, sec. 4603.

§ 994. **Examination of witnesses. Proof of handwriting.** If the will is contested, all the subscribing witnesses who are present in the county, and who are of sound mind, must be produced and examined; and the death, absence, or insanity of any of them must be satisfactorily shown to the court. If none of the subscribing witnesses reside in the county at the time appointed for proving the will, the court may admit the testimony of other witnesses to prove the sanity of the testator and the execution of the will; and, as evidence of the execution, it may admit proof of the handwriting of the testator and of the subscribing witnesses, or any of them. **Kerr's Cyc. Code Civ. Proc., § 1315.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1615.

Colorado. 3 Mills's Ann. Stats., secs. 4681, 4686.

Idaho.* Code Civ. Proc. 1901, sec. 1410.
Kansas. Gen. Stats. 1905, §§ 8680, 8681, 8682, 8683.
Montana.* Code Civ. Proc., sec. 2343.
Nevada. Comp. Laws, sec. 2804.
New Mexico. Comp. Laws 1897, sec. 1982.
North Dakota. Rev. Codes 1905, § 8006.
Oklahoma. Rev. Stats. 1903, sec. 1500.
South Dakota. Probate Code 1904, § 48.
Utah. Rev. Stats. 1898, sec. 3792.
Wyoming.* Rev. Stats. 1899, sec. 4604.

§ 995. Testimony reduced to writing for future evidence.

The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will, or the sufficiency of the proof thereof, if the witness be dead, or has permanently removed from this state. **Kerr's Cyc. Code Civ. Proc., § 1316.**

ANALOGOUS AND IDENTICAL STATUTES

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1616.
Colorado. 3 Mills's Ann. Stats., sec. 4683.
Idaho.* Code Civ. Proc. 1901, sec. 4011.
Kansas. Gen. Stats. 1905, § 8691.
Montana.* Code Civ. Proc., sec. 2344.
New Mexico. Comp. Laws 1897, sec. 1982.
North Dakota. Rev. Codes 1905, § 8006.
Oklahoma. Rev. Stats. 1903, sec. 1501.
South Dakota. Probate Code 1904, § 49.
Utah. Rev. Stats. 1898, sec. 3793.
Washington. Pierce's Code, §§ 2390, 2398.
Wyoming. Rev. Stats. 1899, sec. 4605.

§ 996. Certificate of proof of will. If the court is satisfied, upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge, and attested by the seal of the court, must be attached to the will. **Kerr's Cyc. Code Civ. Proc., § 1317.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1617.
Colorado. 3 Mills's Ann. Stats., sec. 4681.

Idaho.* Code Civ. Proc. 1901, sec. 4012.
 Kansas. Gen. Stats. 1905, § 8684.
 Montana.* Code Civ. Proc., sec. 2345.
 Nevada. Comp. Laws, sec. 2505.
 New Mexico. Comp. Laws 1897, secs. 1983, 1989.
 North Dakota. Rev. Codes 1905, §§ 8006, 8011.
 Oklahoma. Rev. Stats. 1903, sec. 1502.
 South Dakota. Probate Code 1904, § 50.
 Utah.* Rev. Stats. 1898, sec. 3794.
 Wyoming. Rev. Stats. 1899, sec. 4606.

§ 997. Form. Certificate of proof of will, and facts found. (Two witnesses.)

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 { [Title of form.]

State of _____,
 County² of _____, } ss.

I, _____, Judge of the _____³ Court of said County,⁴ do hereby certify:

That on the _____ day of _____, 19____, the annexed instrument was admitted to probate as the last will of _____, deceased; that the testimony taken on the probate of said will, reduced to writing and signed by the witnesses respectively, is filed in this court, and from the proofs taken and the examinations had therein, the said court finds as follows:

That said _____ died on or about the _____ day of _____, 19____, in the county⁵ of _____, state of _____; that at the time of his death he was a resident of the said county⁶ of _____, state of _____; that the said annexed will was duly executed by the said decedent in his lifetime, in the county⁷ of _____, state of _____, and signed by the testator in the presence of _____ and _____, the subscribing witnesses thereto; that he acknowledged the execution of the same in their presence, and declared the same to be his last will; that the said witnesses attested the same at his request, and in his presence, and in the presence of each other; and that the said decedent, at the time of executing said will, was of the age of eighteen years and upwards, was of sound and

disposing mind, and not acting under duress, menace, fraud, or undue influence, and was not, in any respect, incompetent to devise and bequeath his estate.

In witness whereof, I have signed this certificate and caused the same to be attested by the clerk of said court, under the seal thereof, this ____ day of ____, 19__.

____, Judge.

[Seal]

Attest: ____, Clerk of the ____ Court.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County.
3. Title of court. 4-7. Or, city and county.

§ 998. Form. Certificate of rejection of will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of ____,
County² of ____, } ss.

I ____, Judge of the ____ Court of the County³ of ____,
State of ____, do hereby certify:

That on the ____ day of ____, 19__, the annexed instrument was filed in said court, together with the petition of ____, praying that it be admitted to probate as the last will of deceased; that the matter has come regularly on this ____ day of ____, 19__, for hearing; that, after considering the proofs taken and examinations made therein, the court finds that said instrument is not the last will of ____, deceased; and orders that said instrument be rejected and not be admitted to probate.

In witness whereof, I have signed this certificate and caused the same to be attested by the clerk of this court, under the seal thereof this ____ day of ____, 19__.

____, Judge.

[Seal]

Attest: ____, Clerk of the ____ Court.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County.
3. Or, city and county.

§ 999. Will and proof to be filed and recorded. The will, and a certificate of the proof thereof, must be filed and recorded by the clerk, and the same, when so filed and recorded, shall constitute part of the record in the cause or proceeding. All testimony shall be filed by the clerk. **Kerr's Cyc. Code Civ. Proc.**, § 1318.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, pars. 1618, 4230, 4231.

Colorado. 3 Mills's Ann. Stats., secs. 4674, 4815n.

Idaho. Code Civ. Proc. 1901, sec. 4013.

Kansas. Gen. Stats. 1905, §§ 3079, 8685.

Montana.* Code Civ. Proc., sec. 2346.

Nevada. Comp. Laws, sec. 2805.

New Mexico. Comp. Laws 1897, secs. 1968, 1990, 2012.

North Dakota. Rev. Codes 1905, §§ 8006, 8013.

Oklahoma. Rev. Stats. 1903, sec. 1503.

South Dakota. Probate Code 1904, § 51.

Utah. Rev. Stats. 1898, sec. 3795.

Washington. Pierce's Code, §§ 2391, 2392, 2393.

§ 1000. **Form. Order admitting will to probate and for letters testamentary (with or without bond).**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The petition of —, heretofore filed, praying for the admission to probate of a certain instrument in writing filed in this court, purporting to be the last will of —, deceased, and that letters testamentary be issued to said petitioner, this day coming on regularly to be heard; and it being proved, to the satisfaction of this court, that notice has been given, as required by law, to all persons interested, of the time appointed for proving said will, and for hearing said petition, the court proceeds to examine said petitioner, and — and —, the subscribing witnesses to said will, produced in behalf of said petitioner, whose testimony has been reduced to writing and filed; and from which testimony it appears that said instrument in writing is the last will of said —, deceased; that it was executed in all particulars

as required by law; that said testator, at the time of the execution of the same, was of sound and disposing mind, and not under duress, menace, fraud, or undue influence; that said _____ died on or about the _____ day of _____, 19____, being a resident of the county² of _____, state of _____, at the time of his death, and leaving real and personal estate in said state; the personal estate being of the value of _____ dollars (\$_____), or thereabouts; and that the said estate and effects, for and in respect to which the probate of said will is applied for as aforesaid, do not exceed the value of _____ dollars (\$_____); and no objections being made or filed, and said applicant being competent to act as executor of said estate, —

It is ordered, That the said instrument in writing heretofore filed purporting to be the last will of said _____, deceased, be admitted to probate as the last will of said _____, deceased; that said _____ be, and he is hereby, appointed as executor of said estate; and that letters testamentary issue to said petitioner upon his taking the oath as required by law,³ and giving the bond required by law for the faithful execution of the duties of his trust as such executor in the sum of _____ dollars (\$_____), with sufficient sureties, to be approved by the judge of this court.

Done in open court this _____ day of _____, 19____.

_____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, City and County.
3. If no bond is required omit the following clause which relates to it.

§ 1001. Form. Shorter order admitting will to probate and for letters testamentary (with or without bond).

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes the petitioner, _____, by _____, his attorney, and proves to the satisfaction of the court that the time for hearing the petition for the probate of the will filed on the _____ day of _____, 19____, and for letters testamentary thereon, was by the clerk duly set for the _____ day of _____,

19—; and that notice of said hearing has been duly given as required by law; and the matter now coming regularly on for hearing,² and no person appearing to contest the said petition, the court proceeds to hear the evidence and thereupon finds that said — died on the — day of —, 19—, leaving estate in —; ³ that he was then a resident of the county ⁴ of —, state of —; that the other facts alleged in said petition are true; and that said petition ought to be granted.

It is therefore ordered and adjudged, That the written instrument heretofore filed, purporting to be the last will of said deceased, and so alleged to be in said petition, be admitted to probate as the last will of —, deceased; that — be appointed executor of the said last will of said deceased; and that letters testamentary issue to said — upon his taking the oath required by law,⁵ without any bond being required.

Entered ⁶ —, 19—.

—, County Clerk.
By —, Deputy.

Explanatory notes. 1. Give file number. 2. If the matter has been continued, say; and the hearing having been regularly continued to this time. 3. Name of state. 4. Or, city and county. 5. If bonds are not waived, say; and giving bond in the sum of — dollars (\$—). 6. Orders or decrees need not be signed: See § 77, ante.

§ 1002. Form. Order admitting will to probate and for letters of administration with the will annexed.

[Title of court.]

[Title of estate.]

{ No. —.¹ Dept. No. —
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and proves to the satisfaction of the court that the time for hearing the petition for the probate of the will herein filed on —, 19—, and for letters of administration, with the will annexed, was by the clerk duly set for the — day of —, 19—, and that notice of said hearing has been duly given as required by law,² and no person appearing to contest said petition, the court proceeds to hear the evidence, and thereupon finds that the facts alleged therein are true and that said petition ought to be granted.

It is therefore adjudged and determined by the court, That said — died on the — day of —, 19—, leaving estate in the state of —; that he was then a resident of the county³ of —, in said state; that the instrument in writing hereinbefore filed purporting to be his last will, and so alleged to be in said petition, be admitted to probate as the last will of said deceased;

And it is ordered, That — be appointed administrator of said estate with the will annexed; and that letters of administration with the will annexed issue to him upon his taking the oath required by law and giving bond in the sum of — dollars (\$—). —, County Clerk.

Entered⁴ —, 19—.

By —, Deputy.

Explanatory notes. 1. Give file number. 2. If the matter has been continued, say; and the hearing having been regularly continued by the court to this time. 3. Or, city and county. 4. Orders and decrees need not be signed: See § 77, ante.

CONTEST OF PROBATE.

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|--------------------------------------|---|
| 1. Nature of proceeding. | 9. Evidence. |
| 2. Jurisdiction. | (1) In general. |
| (1) In general. | (2) On issue of insanity. |
| (2) Mandate to restore contest. | (3) Suicide. Effect of, as evidence. |
| 3. Parties. | (4) Of undue influence. |
| (1) In general. | (5) Testimony of "intimate acquaintances." |
| (2) Who may not contest. | (6) Testimony of "casual observers." |
| (3) Duty of executor to defend. | (7) Expert witnesses. |
| 4. Time of contest. In general. | (8) Physician as witness. |
| 5. Grounds of contest. | (9) Non-experts. |
| (1) On grounds of invalid execution. | (10) Testimony of wife as to husband's mental condition, etc. |
| (2) Insanity. | (11) Communications with attorneys. |
| (3) Undue influence. | (12) Declarations of legatees, etc. |
| (4) Fraud, etc. | (13) Declarations of testator. In general. |
| 6. Pleadings. | (14) When declarations of testator are incompetent. |
| (1) In general. | |
| (2) Unsoundness of mind. | |
| (3) Undue influence. | |
| 7. Issues. Jury trial of. | |
| 8. Burden of proof. | |
| (1) In general. | |
| (2) On issue of insanity. | |

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| (15) Jury as judges of weight of evidence. | (4) Jurisdiction on appeal. |
| 10. Instructions to jury. | (5) Record. |
| 11. Findings and verdict. | (6) Parties. Who entitled to appeal. |
| (1) Effect of findings. | (7) Time of appeal. |
| (2) Directing a verdict. | (8) Consideration on appeal. |
| (3) Mistrial. | (9) Review of verdict or findings. |
| (4) New trial. | (10) Direct and collateral attack. |
| 12. Appeals. | (11) Effect of appeal as to executor's powers. |
| (1) In general. | 13. No review in equity. |
| (2) Notice of appeal. | |
| (3) Settlement of statement. | |

1. **Nature of proceeding.** A contest of the probate of a will is not a suit or action, either in law or equity, such as to entitle the contestant, as a matter of right, to have the issue as to whether or not the writing was a will, submitted to and tried by a jury. It is a special proceeding,—a proceeding in rem: *Clough v. Clough*, 10 Col. App. 433; 51 Pac. Rep. 513, 515. Under the provisions of the Kansas statute, a contest of the probate of a will has always been considered a formal proceeding by a civil action, in which the issues are defined by formal pleadings, and the rules of evidence, for and against the issues, established by repeated rulings. Either party may demand a jury: *Wright v. Young*, 75 Kan. 287; 89 Pac. Rep. 694, 696. Upon the contest of a will, or of its probate, the question whether the property has escheated, or will escheat, or the question whether the property or its proceeds should be deposited in the state treasury for the benefit of non-resident alien heirs, cannot be considered or adjudicated. The office of the contest is to attack the validity of the purported will alone: *State v. District Court*, 25 Mont. 355; 65 Pac. Rep. 120, 122.

REFERENCES.

Validity of contract not to contest probate of will: See note 13 L. R. A. (N. S.) 484-488.

2. Jurisdiction.

(1) **In general.** The probate court, having express power to entertain a contest of the probate of a will, has power, incidentally, to decide any question which properly arises upon such contest, and, necessarily, upon consent of all the parties interested, to enter a decree affirming and adopting a compromise of such a contest, and ascertaining the shares to which the parties are respectively entitled: *In re Davis' Estate*, 27 Mont. 490; 71 Pac. Rep. 757, 759; *State v. District Court*, 34 Mont. 345; 86 Pac. Rep. 268.

(2) **Mandate to restore contest.** A peremptory writ of mandate will be granted commanding the trial court, under circumstances where

no other adequate or speedy remedy is open, to restore a contest of the probate of a will to its files, and to proceed therewith in the due exercise of its jurisdiction: *Raleigh v. District Court*, 24 Mont. 306; 61 Pac. Rep. 991, 994.

3. Parties.

(1) **In general.** The right of heirs to appear in a contest of the probate of a will cannot be affected in any way by the will itself, which, as to heirs as contestants, can become operative only upon the determination of the contest: *Estate of Wickersham*, 138 Cal. 355; 70 Pac. Rep. 1076, 1077. At or before the hearing of petitions and contests for the probate of wills and other proceedings, where all the parties interested in the estate are required to be notified thereof, the court may, in its discretion, appoint some competent attorney to represent, in all such proceedings, the devisees, legatees, heirs, or creditors of the decedent, who are minors, and have no general guardian in the county, or who are non-residents of the territory; and those interested, who, though they are neither such minors, nor non-residents, are unrepresented. Where the statute so provides, it is likewise discretionary with the court whether an attorney so appointed shall receive a fee for the services which he renders under the appointment, to be paid out of the estate: *In re Roarke's Estate* (Ariz.), 68 Pac. Rep. 527, 528.

REFERENCES.

Persons who may appear and contest a will at the hearing for probate: See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1307.

(2) **Who may not contest.** A person not directly or pecuniarily interested in the estate of a deceased person, at the time of the probate of the testator's will, is not entitled to contest the validity of the same. Hence the interest of a divorced husband in the estate of his deceased wife, contingent on the death of their minor child, does not entitle him to contest her will, because such interest is not regarded, in law, as a sufficient pecuniary interest for such purpose: *Halde v. Schultz*, 17 S. D. 465; 97 N. W. Rep. 369, 371. Only interested persons can contest a will, and it has been held that creditors of an heir are not entitled to that right: *Keeler v. Lauer*, 73 Kan. 388; 85 Pac. Rep. 541, 544; *Lockhard v. Stevenson*, 120 Ala. 641; 24 So. Rep. 996; 74 Am. St. Rep. 63; *Sheppard's Estate*, 170 Pa. 323; 32 Atl. Rep. 1040. Heirs of a testator have no standing to impeach the validity of his will, unless they first establish, by competent proof, that they were the heirs of the testator, and would inherit his estate were it not for the will: *Franke v. Shipley*, 22 Or. 104; 29 Pac. Rep. 268. A public administrator has no right to contest the proof of a will, as he is not a party interested in the estate: *Estate of Hickman*, 101 Cal. 609, 612; 36 Pac. Rep. 118. *Mandamus proceedings by*

the state against the superior court, by an original proceeding to compel the superior court to allow the state to appear as contestant in a proceeding therein pending for the probate of a will, will be dismissed where the petitioner rests its showing as to the interest of the state upon an allegation to the effect that "the deceased had no heirs residing in the state," and where the complaint does not aver that there were no heirs residing elsewhere, nor that the heirs, or any of them, were aliens: *State v. Superior Court*, 148 Cal. 55; 82 Pac. Rep. 672, 673.

REFERENCES.

Contest of probate of will by the state: See note 2 L. R. A. (N. S.) 643-644; 82 Pac. Rep. 672.

(3) **Duty of executor to defend.** It is the duty of an executor to defend against an attack upon the will he represents, and where the executor gives a cost bond on appeal, in case of a contest, a personal liability does not arise thereon, where, under the statute, it is provided that the estate must pay the costs: *State v. Superior Court*, 28 Wash. 677; 69 Pac. Rep. 375, 377. It is the duty of an executor named in a will to take all steps necessary to carry into effect the intent and object of the testator: *Estate of Riviere*, 7 Cal. App. Dec. 312, 314 (Sept. 10, 1908). If a will is presented for probate, but is contested, the executor is entitled to recover against the estate for services rendered by an attorney, in aiding to establish the will: *Estate of Riviere*, 7 Cal. App. Dec. 312, 315 (Sept. 10, 1908).

REFERENCES.

Acceptance of benefit under will as affecting right to attack its validity: See notes 3 Am. & Eng. Ann. Cas. 525; 9 Am. & Eng. Ann. Cas. 956.

4. **Time of contest. In general.** By offering a will for probate, the proponents tender to the world the issue as to its genuineness. Any person interested may appear and contest the instrument so offered upon various grounds, including all grounds substantially affecting its validity, or the question of its due execution. Failing to appear and contest before probate, the right exists for one year after probate. One must be held to have had actual notice of the proceedings in time to make his contest, and he who fails to take advantage of the opportunity to oppose the will, by appearing and contesting within the time allowed by law, must at least, unless he can be held to have been prevented from so appearing and contesting by some fraud of those procuring the probate, be held concluded by the decree as to any matter concerning which he could have obtained relief by a contest: *Tracy v. Muir*, 151 Cal. 363; 90 Pac. Rep. 832, 834. A statement of opposition to the probate of a will may properly

be filed at any time prior to hearing proofs of the will: *Raleigh v. District Court*, 24 Mont. 306; 61 Pac. Rep. 991, 993.

5. Grounds of contest.

(1) **On ground of invalid execution.** As to allegations deemed insufficient to raise an issue as to whether or not a will was attested by two witnesses, who signed at the request, and in the presence, of the testator: See *Estate of Burrell*, 77 Cal. 479; 19 Pac. Rep. 880.

REFERENCES.

Grounds of contest, and opposition to probate: See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1312.

(2) **Insanity.** Insane delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. The mind that is so disordered imagines something to exist, or imputes the existence of an offense which no rational person would believe to exist, or to have been committed, without some kind of evidence to support it. Where a testator, however, entertained a belief or suspicion of his wife's infidelity, and the illegitimacy of his children, but formed such belief or suspicion on an apparent cause, leading, on his part, to a view of his wife's conduct which was erroneous, unjust, and unnatural, this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect on the subject, and hence, not an insane delusion: *Potter v. Jones*, 20 Or. 239; 25 Pac. Rep. 769, 773. Where a belief is entertained, against all evidence and probability, and results in persistent and wholly unfounded notions against, and antipathy for, a relative, and such belief is persisted in after argument to the contrary, it would afford ground for inferring that the person entertaining it may be under an insane delusion: *Medill v. Snyder*, 61 Kan. 15; 58 Pac. Rep. 962, 965. Absolute insanity, as generally understood, is not required to be shown, to destroy testamentary capacity. There may be such a degree of "senile dementia," or a weakness of the understanding and reason, resulting from old age and repeated apoplectic attacks, followed by paralysis, as may be sufficient to sustain a finding of incapacity upon the issue of unsoundness of mind: *Hudson v. Hugnan*, 56 Kan. 152; 42 Pac. Rep. 701, 704. The existence of any insane delusion will not invalidate a will, but only the existence of such as actually influenced a testator in making a will, and which caused prejudice and injury to the contestants: *Estate of McKenna*, 143 Cal. 580, 588; 77 Pac. Rep. 461.

REFERENCES.

Insane delusions, invalidate will when: See note 63 Am. St. Rep. 94.

(3) **Undue influence.** Undue influence, to avoid a will, must be such as to destroy free agency of the testator at the time the instrument is made. It must be a present restraint operating on the mind of the testator at the time of the making of the instrument: *In re Miller's Estate*, 31 Utah, 415; 88 Pac. Rep. 338, 342. Fraud and "undue influence" are not synonymous terms. Undue influence is, in one sense, a species of fraud; and while elements of fraud are sometimes present, undue influence may exist without any positive fraud being shown: *In re Shell's Estate*, 28 Col. 167; 63 Pac. Rep. 413. The definition of undue influence and fraud, as appearing in the code, under a chapter relating to contracts, and entitled "Consent," are applicable in determining issues relating to undue influence and fraud in proceedings to contest a will, and instructions based thereon are not improper: *Estate of Kohler*, 79 Cal. 313; 21 Pac. Rep. 758, 759. Undue influence may be accomplished, not only by physical coercion or threats of personal harm or abuse, but also by the insidious operation of a stronger mind upon one weakened and impaired by disease or otherwise, whereby the latter is subjected to the former, and induced to do his bidding, instead of acting in the exercise of unconstrained volition or judgment. It is not all influence brought to bear upon the mind of the testator in the disposition of his property that may be denominated "undue" influence: *In re Holman's Estate*, 42 Or. 345; 17 Pac. Rep. 908.

REFERENCES.

What constitutes undue influence: See notes 2 L. R. A. 671; 4 L. R. A. 640, 738; 8 L. R. A. 261-263; 31 Am. St. Rep. 670-691.

(4) **Fraud, etc.** An intent to deceive a decedent, or an intent to induce him to execute his will, is always an element, and a necessary element, in any given state of facts, to constitute actual fraud. The same fraud or misrepresentation that will vitiate a contract will vitiate a will: *Estate of Benton*, 131 Cal. 422; 63 Pac. Rep. 775, 777. See *Estate of Kohler*, 79 Cal. 313; 21 Pac. Rep. 758.

REFERENCES.

Wills procured by fraud, undue influence, duress, etc., will be denied probate when: See note *Kerr's Cal. Cyc. Civ. Code*, § 1272.

6. Pleadings.

(1) **In general.** A statement "that the will is contrary to the laws of the state of California, as made and provided by section 1313 Civil Code," is not the allegation of any fact, but is merely a legal conclusion: *Estate of Lennon (Cal.)*, 92 Pac. Rep. 870, 871. Defective and insufficient pleadings can be as well reached in a probate court by demurrer as in a district court, and hence no judgment, for want of an answer, can be taken against a party in a probate court, who

has demurred within the time allowed: *Leggett v. Meyers*, 1 Ida. 548, 549.

(2) **Unsoundness of mind.** In stating the grounds of contest of the probate of a will, if unsoundness of mind is relied on, it is sufficient to state that the deceased, at the time of the alleged execution of the reported will, was not of sound and disposing mind. Unsoundness is the ultimate fact to be found, and all testimony as to acts of inebriety or other causes is for the jury, from which they are to find; and the issue upon that subject is to be of the ultimate fact only. But when the grounds of contest embrace duress, menace, fraud, undue influence, due execution and attestation, subsequent will or the like, such matters, not being ultimate facts, but conclusions of law to be drawn from facts, must be pleaded. The facts (not evidence of the facts) relied on, must be stated, and the issues relating thereto submitted to the jury, to the end that the court, either upon demurrer to the statement of the grounds of the contest, or upon the verdict, may determine whether, as matter of law, such facts so pleaded or found, constitute a valid reason why the purported will should not be admitted to probate: *Estate of Gharky*, 57 Cal. 274, 279.

(3) **Undue influence.** An averment of "undue influence," only in general terms, is a conclusion of law, and is fatally defective. Undue influence is a legal conclusion to be drawn from certain facts, and the facts must be pleaded: *Estate of Sheppard*, 149 Cal. 219; 85 Pac. Rep. 312, 313. See *Estate of Gharky*, 57 Cal. 279.

7. **Issues. Jury trial of.** Proceedings to contest the probate of a will are in their nature equitable, and the trial of issues of fact therein by a jury is not a matter of right unless authorized by statute: *Clayson v. Clayson*, 26 Wash. 253; 66 Pac. Rep. 410, 411. In Oklahoma, a proceeding to contest a will is not a suit at common law, wherein the parties are entitled to a trial by jury as a matter of right, under the seventh amendment to the Federal constitution: *Cartwright v. Holcomb* (Okl.), 97 Pac. Rep. 385. If a will has been contested before its probate, and the contest has been tried before a jury, its subsequent contest should be expeditiously dealt with by the court itself, and it is not, therefore, an abuse of discretion, but within the well-defined policy of the law, to refuse a jury trial in such subsequent contest: *Estate of Dolbeer* (Cal.), 96 Pac. Rep. 266, 270. Under the Idaho statute, where a written demand for a jury in a contest over the probate of a will is on file in the probate court, either party is authorized to enforce its demand in the district court, and the district court, or the judge thereof, may order a jury without a renewal of the demand in writing before that court: *Pine v. Callahan*, 8 Ida. 684; 71 Pac. Rep. 473, 475. If there is

evidence, in a contest over the probate of a will, tending to show undue influence, or ignorance of the contents of the will, which, if believed by the jury, would uphold a verdict, the court should submit to the jury, under appropriate instructions, controverted questions for their findings: *Snodgrass v. Smith* (Col.), 94 Pac. Rep. 312, 313. It is not error for the court to refuse a jury trial upon a hearing to show cause for withholding a will from probate: *Gallon v. Haas*, 67 Kan. 225; 72 Pac. Rep. 770.

8. Burden of proof.

(1) **In general.** In a contest over the probate of a will, the burden of sustaining, before the jury, the issues formed by the answer, is upon the contestants, and the contestants therefore have the right to open and close the argument: *In re Van Alstine's Estate*, 26 Utah, 193; 72 Pac. Rep. 942, 947; *Farleigh v. Kelley*, 28 Mont. 421; 72 Pac. Rep. 756, 758.

(2) **On issue of insanity.** In a contest over the probate of a will, the burden is on the contestant to show affirmatively, and by a preponderance of evidence, the insanity of the testator, if the contest is based upon that ground; and the evidence on appeal, where proper exception is taken, is to be considered in view of this burden which the law casts upon him: *Estate of Dolbeer*, 149 Cal. 227; 86 Pac. Rep. 695, 697; *Estate of Wilson*, 117 Cal. 262, 270; 49 Pac. Rep. 172; *Estate of Nelson*, 132 Cal. 182, 191; 64 Pac. Rep. 294; *Estate of Latour*, 140 Cal. 414; 73 Pac. Rep. 170; 74 Pac. Rep. 441.

REFERENCES.

Presumption and burden of proof as to sanity with relation to wills: See note 36 L. R. A. 721, 724, 733.

9. Evidence.

(1) **In general.** The rules applying to conflicts in and weight of evidence, and credibility of witnesses, is generally the same in a will contest as in other cases of law tried before the court or jury: *In re Miller's Estate*, 31 Utah, 415; 88 Pac. Rep. 338, 346; and California cases cited in the opinion construing a similar statute. The subscribing witnesses to a will are subject to the same rules, as to contradiction and impeachment, as other witnesses: *Farleigh v. Kelley*, 28 Mont. 421; 72 Pac. Rep. 756, 759. Declarations of an absent witness, in support of the validity of a will, cannot be received in evidence for any purpose whatever, for such declarations are hearsay: *Farleigh v. Kelley*, 28 Mont. 421; 72 Pac. Rep. 756, 760. All parties interested are competent to testify to any fact which is relevant and material to the issue involved, where the controversy is between living parties, who, upon the one side, are the devisees or legatees under a will, and on the other, the heirs at law of the testator: *In re*

Miller's Estate, 31 Utah, 415; 88 Pac. Rep. 338, 345 (overruling *In re Atwood's Estate*, 14 Utah, 1; 45 Pac. Rep. 1036; 60 Am. St. Rep. 878, where the statute was given application in the contest of a will). A contest of the probate of a will is not limited to questions concerning the testator's freedom from duress, menace, fraud, or undue influence, or the due execution of the attestation of the will itself. Any question which affects the validity of the will may properly be the subject of controversy: *Farleigh v. Kelley*, 28 Mont. 421; 72 Pac. Rep. 756, 759. It is within the discretion of the court to control the order of proof, and require the contestant of the probate of a will first to establish his interest: *Estate of Edelman*, 148 Cal. 236; 82 Pac. Rep. 962; 113 Am. St. Rep. 231; *Estate of Wickersham (Cal.)*, 96 Pac. Rep. 311, 314. The contestant, in a proceeding to contest the probate of a will, is not limited to the testimony of the subscribing witnesses of the will as to the mental capacity of the testator at the time of executing the same: *Ashworth v. McNamee*, 18 Col. App. 85; 70 Pac. Rep. 156. In a contest over the probate of a will, where the will provides for a bequest, and the testator accompanies the bequest with a request to dispose of the same in the manner "specified in my letter to him of this date," such letter is properly excluded from evidence: *Estate of Shillaber*, 74 Cal. 144; 15 Pac. Rep. 453, 454.

REFERENCES.

Declaration of legatee or devisee as to mental capacity of testator, admissibility of: See note 9 Am. & Eng. Ann. Cas. 807. Proof of writings by subscribing witnesses, in general: See note **Kerr's Cal. Cyc. Code Civ. Proc.**, § 1940.

(2) **On issue of insanity.** The wife's knowledge and observation of the husband's habits and mental condition, after a divorce granted, renders her competent to express an opinion as to his sanity: *In re Van Alstine's Estate*, 26 Utah, 193; 72 Pac. Rep. 942, 943. Where the contention of the contestant was that the testatrix was the victim of hereditary insanity, and that the taint was in her blood from her mother's and father's people, it is perfectly proper to put before the jury the fact that the testatrix's immediate paternal progenitor was not only sane, but of exceptional mental power, and had borne a part in the active affairs of business life. It will not be presumed that a child inherits the insane and not the sane tendencies of his family: *Estate of Dolbeer*, 149 Cal. 227; 86 Pac. Rep. 695, 704; *Estate of Redfield*, 116 Cal. 637; 48 Pac. Rep. 794. Evidence as to incapacity and insane delusions, examined and held insufficient to show want of testamentary capacity: See *Skinner v. Lewis*, 40 Or. 571; 67 Pac. Rep. 951, 953. The verdict of a coroner's jury is not admissible in evidence upon the issue of the sanity of the testator: *Hollister v. Cordoro*, 76 Cal. 649; 18 Pac. Rep. 855; *Rowe v. Such*, 124 Cal. 576; 66 Pac. Rep.

862; 67 Pac. Rep. 760; *Oppenheim v. Cluny*, 142 Cal. 313; 75 Pac. Rep. 899; *Estate of Dolbeer*, 149 Cal. 227; 86 Pac. Rep. 695, 704.

REFERENCES.

Presumptions arising when partial insanity has been shown: See note 41 Am. Rep. 686, 688. Opinions of subscribing witnesses to will as to sanity or insanity of the testator: See note 39 L. R. A. 715-722.

(3) **Suicide. Effect of, as evidence.** It is not a man's conduct or appearance, at the time of the execution of his will, that determines his testamentary capacity. These indications must be considered in connection with all of the circumstances leading up to that time, in order that a proper estimate may be made of his mental capabilities, and of the influences, if any, that prompted his testamentary action. The fact of suicide is, in itself, at times, sufficient to raise serious doubt of the decedent's sanity. Where this fact exists, and other circumstances tending to raise a doubt as to the sanity of the testator, are given in evidence, it is proper to consider all such evidence in determining the question at issue: *Rathjens v. Merrill*, 38 Wash. 442; 80 Pac. Rep. 754, 756. Upon the issue of insanity, the fact that the testator committed suicide, is to be taken into consideration like any other fact in the case: *Estate of Dolbeer*, 149 Cal. 227, 252; 86 Pac. Rep. 695.

(4) **Of undue influence.** To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient to show that the party benefited by the will had the motive and opportunity to exert such influence; there must be evidence that he did exert such influence and so control the actions of the testator, either by importunities which the testator could not resist, or that by deception, fraud, or other improper means, the instrument is not really the will of the testator: *Hubbard v. Hubbard*, 7 Or. 42, 47. Evidence that one of the residuary legatees, who would receive part of the estate by a provision in his favor, drew the will; that he had been, for a long time before, the attorney for the testator; and that the testator, when he made the will, was old, feeble, and suffering from disease; is sufficient to raise a technical implication or presumption that the will was procured by undue influence, or would, at least, require the proponents to show what did actually occur at the time of its execution and prior thereto, so that the presence or absence of undue influence may be determined; but such presumption does not create a conflict of evidence, upon which it is necessary to allow the jury to decide: *Estate of Morey*, 147 Cal. 495; 82 Pac. Rep. 57, 62. Where it appears that the testator was of sound mind at the time of making his will, it is not sufficient to show that the circumstances attending its

execution are consistent with the hypothesis of its having been obtained by undue influence. It must be shown that such circumstances are inconsistent with a contrary hypothesis; that such influence was present and operated on the testator's mind at the time he executed his will: *Gwin v. Gwin*, 5 Ida. 271; 48 Pac. Rep. 295, 300. As to what is sufficient proof to establish undue influence must depend on the facts and circumstances of each particular case. The only positive and affirmative proof required is of facts and circumstances from which the undue influence may be reasonably inferred: *Blackman v. Edsall*, 17 Col. App. 429; 68 Pac. Rep. 790, 793.

REFERENCES.

Character of presumption as to undue influence in gift or bequest to mistress: See note 11 L. R. A. (N. S.) 554. Presumption of undue influence arising from relation of man and mistress: See note 9 Am. & Eng. Ann. Cas. 783. Unnatural or unreasonable character of will as evidence of undue influence: See note 7 Am. & Eng. Ann. Cas. 894.

(5) **Testimony of "intimate acquaintances."** Friends of a testatrix, who had known her for twenty years, some for a longer period, and who were on terms of social intimacy with her, and had seen and conversed with her immediately before and after the execution of the will, are "intimate acquaintances," under any definition of that term, as employed in the statute: *Estate of McKenna*, 143 Cal. 580, 583; 77 Pac. Rep. 461. The testimony of intimate acquaintances of the deceased, concerning his unsoundness of mind, must be given with the reasons upon which it is based, and the opinion itself can have no weight other than that which the reasons bring to its support: *Estate of Dolbeer*, 149 Cal. 227, 236; 86 Pac. Rep. 695, 699. A determination of the fact as to what constitutes an "intimate acquaintance," under the statute, must be committed to the discretion of the trial court, and the appellate court will not interfere with the exercise of that discretion, unless there has been a clear abuse of it: *Estate of McKenna*, 143 Cal. 580; 77 Pac. Rep. 461, 462. Where the testimony of witnesses is preceded by proof as to the intimacy required by the statute, and is accompanied by the reasons for their opinions, the objection to the testimony given as to the condition of mind of the testator, as relating to a time too remote from that of the execution of the will, is not tenable, where it appears that the disease causing his insanity was a progressive one: *Estate of Dalrymple*, 67 Cal. 444; 7 Pac. Rep. 906. An "intimate acquaintance" is allowed to give his opinion merely because he had exceptional opportunities for observing the mental condition of the person in question. The result of his observation cannot be given adequate expression except in the form of an opinion: *Huyck v. Rennie*, 151 Cal. 411; 90 Pac. Rep. 929, 931. While the appellate court will not

interfere as to the determination of the question, whether a witness was an "intimate acquaintance," within the meaning of the code, unless there has been an abuse of the discretion of the trial court; on the other hand, the exclusion of testimony, which was evidently material and important, and might probably have changed the result, and which was within the range of legal evidence, is ground for reversal: *Estate of Carpenter*, 79 Cal. 382; 21 Pac. Rep. 835, 836.

(6) **Testimony of "casual observers."** "Casual observers," or those who have had only limited opportunities of observing the habits and mental peculiarities of the testator, are not competent to give any testimony and opinions as to his mental capacity: *Heirs of Clark v. Ellis*, 9 Or. 128, 140.

(7) **Expert witnesses.** Evidence of medical experts, although skilled alienists, coming from persons who have never seen the testator, and who base their opinions upon the facts given in hypothetical questions, which eliminate from consideration all countervailing evidence, is evidence of the weakest and most unsatisfactory kind: *Estate of Dolbeer*, 149 Cal. 227; 86 Pac. Rep. 695, 702.

(8) **Physician as witness.** The rule as to the competency of an attorney to give testimony, after the death of the testator, is applicable also to physicians. And it has been held, under a Colorado statute, that, when the dispute is between the devisees and heirs at law, all claiming under the deceased, either as devisees or heirs, may call the attending physician as a witness: *In re Shapter's Estate*, 35 Col. 578; 85 Pac. Rep. 688, 691. See *Thompson v. Ish*, 90 Mo. 160; 12 S. W. Rep. 510; 17 Am. St. Rep. 552. A general practitioner, who has had experience in the various kinds of mental cases, is as competent to testify as to the sanity or insanity, as the skilled expert who devotes his entire time to the study of mental diseases: *Estate of Dolbeer*, 149 Cal. 227; 86 Pac. Rep. 695, 704. Where physicians were in attendance upon the testator before his death, and had an opportunity to observe and know the mental condition of the deceased, and all concurred in giving testimony to the effect that the deceased was utterly lacking in testamentary capacity at the time they examined him, the testimony of such witnesses is entitled to great consideration, where, aside from their experience and personal knowledge of the subject, they were wholly disinterested witnesses: *Hartley v. Lord*, 38 Wash. 221; 80 Pac. 433, 434.

(9) **Non-experts.** In an action in which the validity of a will is involved, testimony of non-experts is admissible, as a rule of necessity, as to certain indicia of mental disorder, such as peculiar conduct, acts, and deportment of the person, which create a fixed and

reliable judgment in the mind of the observer, but which cannot be conveyed in words to the jury. For example, a person may appear to be sad, dejected, sick, or well, yet such appearances could not be described satisfactorily, and hence a conclusion is permitted to be given: *Zirkle v. Leonard*, 61 Kan. 636; 60 Pac. Rep. 318.

(10) **Testimony of wife as to husband's mental condition, etc.** Upon the trial of a contest over the probate of a will, the wife of the testator may testify, of her own knowledge, of her deceased husband's habits and mental condition obtained by observation, and not from anything communicated to her in confidence by her husband. For example, on the issue that the husband was habitually intemperate, if the wife is asked the question: "What was the condition that he was in when he was under the influence of liquor," the wife may testify and the question is not within the prohibitive clause of the statute: *In re Van Alstine's Estate*, 26 Utah, 193; 72 Pac. Rep. 942, 943.

(11) **Communications with attorneys.** The privilege between an attorney and client, as to communications or statements made by the deceased to his attorney preparing the will, with respect to the subject-matter thereof, and what the attorney heard or saw with respect thereto, do not fall within the privilege of the statute as to communications between attorney and client under the Utah statute, which, in effect, is no broader than the common law upon the subject: *In re Young's Estate* (Utah), 94 Pac. Rep. 731, 734. As between heirs or beneficiaries of a deceased person in a will contest, where undue influence or want of capacity is in issue, neither side can invoke the privilege as against the testimony of an attorney who prepared the will under the direction of the deceased, and the attorney should be required to disclose all matters relevant to such issues, the same as any other person cognizant of the facts would be: *In re Young's Estate* (Utah), 94 Pac. Rep. 731, 735. Under the Colorado statute, an attorney is incompetent to testify as to communications made to him by the testator while serving him in the preparation of the will, where such attorney is himself a beneficiary under the will: *In re Shapter's Estate*, 35 Col. 578; 85 Pac. Rep. 688, 691. As to the same rule in states where interest generally affects the competency of a witness to testify, see *Smith v. Smith*, 168 Ill. 488, 489; 48 N. E. Rep. 96; *Bardell v. Brady*, 172 Ill. 420; 50 N. E. Rep. 124.

REFERENCES.

Privilege of communications to attorney during preparation of will: See note 17 L. R. A. 188.

(12) **Declarations of legatees, etc.** Admissions and declarations of the legatee are admissible in evidence against the will, where he is

the sole beneficiary under it. Such evidence is admissible not only as bearing on the credibility of the legatee, when a witness, but also as substantive evidence of an admission against interest as a fact in issue, and is competent, no matter when made. The time, place, and circumstance of their making go to the weight, not to the competency of the evidence: *In re Miller's Estate*, 31 Utah, 415; 88 Pac. Rep. 338, 343. Evidence of acts and declarations of one legatee or devisee cannot be admitted against the individual legatee or devisee who makes them, where the mental incapacity of the testator is the question in issue: *Estate of Dolbeer*, 149 Cal. 227, 246; 86 Pac. Rep. 695.

(13) **Declarations of testator. In general.** Declarations made by the testator both before and after the execution of the will are alike admissible: *In re Miller's Estate*, 31 Utah, 415; 88 Pac. Rep. 338, 343. The greater weight of authority favors the admission in evidence of the declarations of the decedent made after the execution of a will, as well as before, if made within a reasonable time prior to his death. Thus declarations tending to show affection toward the devisees in the will, with no change in feelings toward them, thereby indicating the improbability of a desire to revoke the instrument, when corroborated by direct evidence that, after the making of the declarations, the testator had no opportunity to withdraw the will from its place of deposit, or otherwise to come into possession of it, may be admitted for the purpose of having the court infer that the will had not been returned to the testator's possession, nor revoked: *In re Miller's Will (Or.)*, 90 Pac. Rep. 1002, 1009. A testator cannot impeach the validity of his will by any subsequent oral declarations, any more than can a maker of any other written instrument impeach its validity: *Calkins' Estate v. Calkins*, 112 Cal. 296, 301; 44 Pac. Rep. 577. See also *Gwin v. Gwin*, 5 Ida. 271; 48 Pac. Rep. 295, 301. While the testator lives, the attorney drawing his will would not be allowed, without the consent of the testator, to testify as to communications made to him concerning it, or to the contents of the will itself; but after the testator's death, and when the will is presented for probate, the attorney may be allowed to testify as to directions given to him by the testator, so that it may appear whether the instrument presented for probate is, or is not, the will of the alleged testator: *Estate of Dominici*, 151 Cal. 181; 90 Pac. Rep. 448, 450. See *In re Wax*, 106 Cal. 348; 39 Pac. Rep. 624; *Estate of Nelson*, 132 Cal. 187; 64 Pac. Rep. 294.

REFERENCES.

Admissibility of the declarations of a testator to sustain, defeat, or aid in the construction of his alleged will: See note 107 Am. St. Rep. 459-473. Antetestamentary declarations of a testator as evidence of

undue influence in the making of a will: See note 3 L. R. A. (N. S.) 749-753. Declarations of testator not made at time of execution of will, admissibility of, on question of undue influence: See note 6 Am. & Eng. Ann. Cas. 608. Declaration of testator, admissibility of, upon issue of revocation of will which cannot be found: See note 3 Am. & Eng. Ann. Cas. 960. Declaration of testator to impeach or invalidate will: See notes 3 Am. Dec. 395; 52 Am. Dec. 167; 62 Am. Dec. 80.

(14) **When declarations of testator are incompetent.** External facts, constituting the exercise of undue influence, must be established by other evidence than the declarations of the testator. His declarations are incompetent to show either that the influence was exercised, or that it affected his actions, and are inadmissible, except as they may illustrate his mental state and give a picture of the condition of his mind, contemporaneous with the declarations themselves: *Calkins' Estate v. Calkins*, 112 Cal. 296; 44 Pac. Rep. 577, 579. Declarations of the deceased made after the execution of the will, and showing his dissatisfaction with it, cannot be admitted to prove the fact of undue influence. In the absence of proof of undue influence, such declarations are entitled to no weight: *Gwin v. Gwin*, 5 Ida. 271; 48 Pac. Rep. 295, 301. See *Herwick v. Langford*, 108 Cal. 608, 704; 41 Pac. Rep. 701; *Estate of McDevitt*, 95 Cal. 17; 30 Pac. Rep. 101. Evidence of what the testator said, just before his death, to his executor, as to what was intended by his will, and who wrote it, where such declarations sought to be proved were made five years after the date of the will, is inadmissible, and constitutes no part of the *res gestae*: *Estate of Gilmore*, 81 Cal. 240; 22 Pac. Rep. 655, 656. Oral declarations of a testator, as to what he intended, cannot be admitted to vary the plainly expressed intention in the will. Testimony to the effect that a stepdaughter of a brother of a testatrix was spoken of by the testator as his "niece," is insufficient to bring her within the category of "my nieces": *Estate of Holt*, 146 Cal. 77; 79 Pac. Rep. 585.

(15) **Jury as judges of weight of evidence.** The weight to be given to the testimony of witnesses is solely for the jury, and it is not error to refuse to instruct the jury to give special weight or consideration to the testimony of any particular witness: *Huyek v. Rennie*, 151 Cal. 411; 90 Pac. Rep. 929, 931.

10. Instructions to jury. Instructions to a jury, upon the issue of undue influence and fraud, are erroneous, where the court, in effect, tells the jury that they are at liberty, under the circumstances of the case, to find that the will under investigation had been executed by reason of undue influence,—although there was no direct evidence of the fact, and this in opposition to positive evidence to the contrary: *Calkins' Estate v. Calkins*, 112 Cal. 296; 44 Pac. Rep. 577, 580. The

fact that the testator commits suicide is to be considered by the jury only as a fact in evidence bearing upon the issue of the sanity or insanity of the deceased. The refusal of the court to give the following instruction, to wit: "The jury are instructed that the fact that the testatrix committed suicide, if the jury shall find that she did commit suicide, is not of itself sufficient evidence of unsoundness of mind; but this is proper to be considered upon the question of the mental condition of the testatrix, and if the jury find that Bertha M. Dolbeer did commit suicide, they may take that fact into consideration in determining whether or not she was of sound mind at the time of the making of the will in question"; and other instructions which may be considered to stand in like position, afford no substantial ground for a reversal of the case, where the jury was instructed that they were to consider all the evidence in the case in determining this question: *Estate of Dolbeer*, 149 Cal. 227; 86 Pac. Rep. 685, 706.

REFERENCES.

Intention of testator, instructions construing will according to: See note *Kerr's Cal. Cyc. Civ. Code*, § 1317.

11. Findings and verdict.

(1) **Effect of findings.** Where a case is tried before a district court, without a jury, and a general finding of fact is made upon oral testimony, such finding is a finding of every special thing necessary to sustain the general finding, and is conclusive, in the appellate court, upon the doubtful or disputed questions of fact. So a general finding in favor of the validity of the will, as against the contesting parties, is an affirmation of the circumstances of every special fact necessary to uphold the judgment: *Smith v. Holden*, 58 Kan. 535; 50 Pac. Rep. 447, 450. A finding of insanity is of a probative fact, to establish the invalidity of a will, the same as duress or undue influence: *Gridley v. Boggs*, 62 Cal. 190, 203.

(2) **Directing a verdict.** In the trial of a contest over the probate of a will, before a jury, the court may, as in an ordinary civil action, when the facts of the case require it, direct a verdict, and a failure to do so, in such case, would be an evasion of duty: *In re Shell's Estate*, 28 Cal. 167; 63 Pac. Rep. 413, 415.

(3) **Mistrial.** Where the findings, upon questions growing out of a contest of the probate of a will, are either upon conclusions of law and not of fact, or upon immaterial or irrelevant matters, the effect is a mistrial, and no lawful judgment can be entered thereon: *In re Langan's Estate*, 74 Cal. 353; 16 Pac. Rep. 188, 189.

(4) **New trial.** Where special findings in a proceeding to contest the probate of an alleged will are so contradictory and inconsistent

that no conclusion of law can be drawn from them, a judgment rendered thereon cannot be sustained, and a new trial should be granted: *Gwin v. Gwin*, 5 Ida. 271; 48 Pac. Rep. 295, 297; *Kearns v. McKeon*, 65 Cal. 411; 4 Pac. Rep. 404.

12. Appeals.

(1) **In general.** A proceeding to probate a will is in rem. The judgment is in rem, and from it, any person interested may appeal: *Blackman v. Edsall*, 17 Col. App. 429; 68 Pac. Rep. 790, 791. Under the provisions of the Idaho statute, an appeal may be taken to the district court from a judgment or order of the probate court in probate matters,—among other orders, that of admitting or refusing to admit a will to probate. But the provisions of that section do not apply to appeals from the district court to the supreme court: *In re Paige's Estate*, 12 Ida. 410; 86 Pac. Rep. 273, 274. An application for a writ of certiorari, made to the supreme court, to review an order vacating and annulling an order admitting a will to probate, will be refused, where an appeal from the order would afford adequate relief: *Dunsmuir v. Coffey*, 148 Cal. 137; 82 Pac. Rep. 682.

(2) **Notice of appeal.** A notice of appeal, dated and served after the perfection of the decree, in a proceeding for the probate of a will, clearly indicating that the appellant desired to appeal from the whole decree in said proceeding, and describing the decree as one dated the day the findings and conclusions were filed, should be construed to be a notice of appeal from the final decree, and not from the findings and conclusions alone: *In re Lemery's Estate* (N. D.), 107 N. W. Rep. 365. Upon an appeal from an order admitting a will to probate, the legatees and devisees under the will are "adverse parties," upon whom the notice of appeal must be served: *Estate of Scott*, 124 Cal. 671, 674; 57 Pac. Rep. 654.

(3) **Settlement of statement.** In settling a statement of the proceedings, in a contest of the probate of an alleged will, it is not a proper exercise of the discretion vested in the trial judge, to require a transcript of the full reporter's notes as a condition for settling such statement, and a peremptory writ of mandate will issue requiring the judge to settle the same, either as presented, or as amended, so as to make a fair statement: *Vatcher v. Wilbur*, 144 Cal. 536; 78 Pac. Rep. 14, 16.

(4) **Jurisdiction on appeal.** The probate court is vested with full power to inquire into the sufficiency of the authentication, and to ascertain, whether, under the proof offered, the will should be admitted to record. Being vested with jurisdiction, its findings and determination are final, unless corrected upon appeal or proceedings in error, and are not subject to collateral attack: *Calloway v. Cooley* (Kan.),

32 Pac. Rep. 372, 376. An order revoking an order refusing to admit a will to probate, is not within the appellate jurisdiction of the supreme court, not being named in section 963 of the California Code of Civil Procedure, enumerating reviewable matters: *Estate of Bouysou*, 1 Cal. App. 657; 82 Pac. Rep. 1066. See *Estate of Cahill*, 142 Cal. 628; 76 Pac. Rep. 383. An order dismissing a contest over the probate of a will is reviewable upon appeal from the final order or judgment admitting the will to probate: *Estate of Edelman*, 148 Cal. 233; 82 Pac. Rep. 962, 963.

(5) **Record.** Orders continuing the hearing for probating, under the California code, do not form a necessary part of the judgment roll, or "technical record"; and even if they did, their absence would not invalidate the order admitting the will to probate: *Estate of Davis* (Cal.), 86 Pac. Rep. 183, 185. If the record is silent on the question of service, the court will presume that service was made, when the judgment comes into question collaterally: *Estate of Davis* (Cal.), 86 Pac. Rep. 183, 185.

(6) **Parties. Who entitled to appeal.** Infants desiring to obtain the probate of a will may institute a proceeding therefor by a next friend, and through him may appeal from a decision of the probate court rejecting a will: *Schnee v. Schnee*, 61 Kan. 643; 60 Pac. Rep. 738. The beneficiaries under a trust created by a holographic will are entitled to appeal from an order refusing the probate of such will, because they are "aggrieved" parties, and the court will not, on appeal, determine the validity of the trust clause as to the appellants: *Estate of Fay*, 145 Cal. 82, 87; 104 Am. St. Rep. 17; 78 Pac. Rep. 340, 342. Where the trial court rightly holds, on a petition for distribution, that the probate of the will was conclusive on all parties, it follows that persons claiming to be heirs have no interest in the proceedings, where they were not beneficiaries under the will. Such persons are not "aggrieved" by orders or proceedings in the estate, subsequent to the probate of the will: *Estate of Davis* (Cal.), 86 Pac. Rep. 183, 186. Upon appeal from an order admitting a will to probate the contestant must first establish his interest: *Estate of Latour*, 140 Cal. 437; 73 Pac. Rep. 1070; 74 Pac. Rep. 444; *Estate of Edelman*, 148 Cal. 233; 82 Pac. Rep. 962, 963. An executor named in a will is entitled to appeal from a judgment that the will is invalid, and refusing to admit it to probate. He has a direct interest in having the will sustained, and the same probated, and is necessarily "aggrieved" by a denial of his right to act as executor: *Halde v. Schultz*, 17 S. D. 465; 97 N. W. Rep. 369, 370. In an action by an administrator and certain remote beneficiaries of a will devising real estate, against other beneficiaries thereunder, for a construction of the will, the administrator has no such interest in the controversy as to

entitle him to a review of the judgment on appeal; an appeal from the judgment in such a case will therefore be dismissed: *Virden v. Hubbard*, 37 Col. 37; 86 Pac. Rep. 113; *Barth v. Richter*, 12 Col. App. 365; 55 Pac. Rep. 610.

(7) **Time of appeal.** The California code expressly requires probate orders to be entered in the minute-book of the court. It is the order there entered which is the order of the court, and it is the date of the entry of this order which, under the decisions, sets the time running for an appeal: *Tracy v. Coffey* (Cal.), 95 Pac. Rep. 150, 151. An appeal from an order refusing the probate of a holographic will is properly taken within sixty days from the entry of the order: *Estate of Fay*, 145 Cal. 82, 87; 104 Am. St. Rep. 17; 78 Pac. Rep. 340. Where an appeal from an order refusing to admit a will to probate is taken within sixty days after the entry of the order, it is within time, under the California code, and the section of the code providing for appeals within sixty days after "the rendition of the judgment" does not apply to appeals from such orders: *Estate of Fay*, 145 Cal. 82, 83; 78 Pac. Rep. 340, 342.

(8) **Consideration on appeal.** Appellate courts confine the questions considered on appeal to such matters alone as were litigated before, and passed upon by, the trial court: *Estate of Sullivan*, 40 Cal. 202; 82 Pac. Rep. 297, 301. Alleged errors of law committed during the trial of a contest over the probate of a will are not ground for reversal, where the appellant was not prejudiced thereby: *Estate of Spencer*, 96 Cal. 448, 450; 31 Pac. Rep. 453. An order dismissing the contest of a will, because of contestant's lack of interest, may be reviewed on appeal from an order admitting the will to probate: *Estate of Edelman*, 148 Cal. 233; 82 Pac. Rep. 962, 963. Objections to evidence admitted upon the hearing of the petition for probate, cannot be raised in the supreme court, unless first raised in the trial court at the hearing: *Estate of Doyle*, 73 Cal. 564; 15 Pac. Rep. 125, 127. The granting of a new trial of a contest over the probate of a will, upon motion of contestants, will not be disturbed, unless it can be said that the court went beyond its discretion in granting the same: *Estate of Wickersham*, 138 Cal. 355; 70 Pac. Rep. 1076, 1077. For an examination and review of testimony on a contest over the probate of a will, upon grounds of insanity, undue influence, and invalid execution of the will, on appeal, and reversing an order denying a new trial for contestant, see *Gwin v. Gwin*, 5 Ida. 271; 48 Pac. Rep. 295. In a contest over the probate of a will, where the issues are tried by a jury, the question, whether the court committed error in directing the jury to return a verdict in favor of the contestant, is to be determined by the rules applicable in ordinary civil actions: *Snodgrass v. Smith* (Col.), 94 Pac. Rep. 312, 313.

(9) **Review of verdict or findings.** The rule that a verdict or finding will not be disturbed, where there is a real or substantial conflict of evidence on the issue of fact involved, applies to litigation over the validity of wills as well as any other kind of litigation: *Estate of Doolittle* (Cal.), 94 Pac. Rep. 240, 241; *In re Abel's Estate* (Nev.), 93 Pac. Rep. 227, 230. See *Richardson v. Moore*, 30 Wash. 406; 71 Pac. Rep. 18, 20. Where the legatee of a charitable bequest is uncertain, the finding of the probate court, relating to such bequest, will not be disturbed on appeal: *Estate of Casement*, 78 Cal. 136; 26 Pac. Rep. 362, 364. And the same rule applies to findings as to the mental condition of a deceased at the time of the execution of the will upon a hearing for its admission to probate: *King v. Ponton*, 82 Cal. 420; 22 Pac. Rep. 1087, 1088. Also as to the verdict of the jury upon the issue of mental unsoundness of the testator: *Estate of McKenna*, 143 Cal. 580; 77 Pac. Rep. 461, 462. And as to testamentary capacity, habits, and mental condition of the deceased: *In re Rathjen's Estate*, 45 Wash. 55; 87 Pac. Rep. 1070. The findings of a jury upon the issue submitted to them, in a contest over the probate of a will, stand upon the same footing as the findings of fact made by the court in a civil action; that is, when the appellate court is brought to the consideration of their sufficiency to support the judgment rendered: *Estate of Benton*, 131 Cal. 472; 63 Pac. Rep. 775, 776. There are many authorities which hold that, in a contest over the probate of a will, the verdict will not be set aside when the question as to the correctness of the verdict, in view of the evidence, is raised in the appellate court, unless there is clearly a legal insufficiency in the evidence to sustain it: *In re Abel's Estate* (Nev.), 93 Pac. Rep. 227, 230. And particularly has this been held to be the rule when the trial court has declined to interfere: *In re Abel's Estate* (Nev.), 93 Pac. Rep. 227, 230. Where, upon a contest over the probate of a will, one of the subscribing witnesses being dead and the other unable to recollect certain matters connected with the making of the will, no evidence was presented tending in any way to invalidate the will, the court found on proof of the signatures of the testatrix and the attesting witnesses, that the testimony was, under the circumstances, sufficient to establish the due execution of the instrument, such finding will not be disturbed on appeal: *Estate of Tyler*, 121 Cal. 405; 53 Pac. Rep. 928, 929. Findings, absolutely without support, except such as they receive from the conclusions reached and expressed by the jury, as to the unsoundness of mind of the testator, are not binding upon the court upon appeal: *Estate of Mullin*, 110 Cal. 252; 42 Pac. Rep. 645, 646.

(10) **Direct and collateral attack.** Proceedings in the course of administration of an estate, where the order or judgment made is appealable, such as orders admitting wills to probate, etc., which can

be attacked directly by appeal, or by some motion authorized by law for the purpose, or, perhaps, by a bill in equity, are steps in the administration intended to be final in their nature, and not subject to review in a subsequent stage of the administration of the estate. An attack, in any other way, made in a different proceeding in the same estate, is collateral: *Estate of Davis* (Cal.), 86 Pac. Rep. 183, 185. See *Estate of Devincenzi*, 119 Cal. 498; 51 Pac. Rep. 845. In a collateral attack upon a judgment of a court of general jurisdiction, the judgment can be impeached only for a want of jurisdiction appearing upon the face of the judgment roll; or, as sometimes stated, only a judgment which is void on its face may be set aside on collateral attack: *Estate of Davis* (Cal.), 86 Pac. Rep. 183, 185. See *People v. Thomas*, 101 Cal. 571; 36 Pac. Rep. 9; *Estate of Eichoff*, 101 Cal. 600; 36 Pac. Rep. 11. An order admitting a will to probate, even though erroneous, is still valid unless reversed upon direct proceedings on appeal: *Dunsmuir v. Coffey*, 148 Cal. 137; 82 Pac. Rep. 682, citing *Goldtree v. McAlister*, 86 Cal. 93; 24 Pac. Rep. 801; *Erwin v. Scriber*, 18 Cal. 500. A declaration of the probate court, as to the residence of deceased at the time of his death, is final in all collateral proceedings: *Estate of Dole*, 147 Cal. 188; 81 Pac. Rep. 534, 537. Heirs at law, who expressly consented to a decree probating a will, cannot afterward, without any showing of fraud, be permitted to attack the decree, where the judgment was not void, and the error committed by the court, if any, in admitting the will to probate, was not an error in the assumption of jurisdiction, but in the exercise of jurisdiction, which it had assumed and had. If there was error in admitting the will to probate, it was reviewable only on error or appeal: *Camplin v. Jackson*, 34 Cal. 447; 83 Pac. Rep. 1017, 1018.

REFERENCES.

Collateral attack upon right of corporation to take by devise: See note 4 Prob. Rep. Ann. 674-679. Conclusiveness of probate as res judicata: See note 21 L. R. A. 680-689.

(11) **Effect of appeal as to executor's powers.** An appeal by an executor, from an order annulling decedent's will, does not have the effect of authorizing him to continue acting for all purposes as executor, notwithstanding the judgment entered by the court. The appeal has the effect of continuing him as executor only for the purposes of such appeal, but does not revive his general powers as executor: *State v. Superior Court*, 28 Wash. 677; 69 Pac. Rep. 375, 377.

13. **No review in equity.** A decree probating a will is not subject to review in equity for fraud or mistake: *Bacon v. Bacon*, 150 Cal. 477; 89 Pac. Rep. 317, 319.

CHAPTER III.

PROBATE OF FOREIGN WILLS.

- § 1003. Wills proved in other states to be recorded, when and where.
- § 1004. Proceedings on production of foreign will.
- § 1005. Form. Petition for probate of foreign will.
- § 1006. Form. Notice of time and place set for hearing petition for probate of foreign will, and for the issuance of letters testamentary thereon.
- § 1007. Form. Order fixing hearing on petition for proving foreign will, etc., and application for letters of administration with the will annexed.
- § 1008. Hearing proofs of probate of foreign will.
- § 1009. Form. Certificate of proof of foreign will and facts found.
- § 1010. Form. Order admitting foreign will to probate and for letters (with or without bond).

PROBATE OF FOREIGN WILLS.

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|--------------------------------|---|
| 1. In general. | 4. Instrument when not entitled to probate as such. |
| 2. Jurisdiction of courts. | 5. Issues to be determined. |
| 3. Effect of foreign judgment. | |

§ 1003. Wills proved in other states to be recorded, when and where. All wills duly proved and allowed in any other of the United States, or in any foreign country or state, may be allowed and recorded in the superior court of any county in which the testator shall have left any estate. **Kerr's Cyc. Code Civ. Proc., § 1322.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1619.
- Colorado.** 3 Mills's Ann. Stats., sec. 4687.
- Idaho.** Code Civ. Proc. 1901, sec. 4014.
- Kansas.** Gen. Stats. 1905, §§ 8693, 8694.
- Montana.*** Code Civ. Proc., sec. 2350.
- Nevada.** Comp. Laws, sec. 2807.
- New Mexico.** Comp. Laws 1897, sec. 2017.
- North Dakota.** Rev. Codes 1905, § 8037.
- Oklahoma.** Rev. Stats. 1903, sec. 1504.
- South Dakota.** Probate Code 1904, § 52.
- Utah.*** Rev. Stats. 1898, sec. 3806.
- Washington.** Pierce's Code, § 2410.
- Wyoming.** Rev. Stats. 1899, sec. 4582.

§ 1004. **Proceedings on production of foreign will.** When a copy of the will, and the probate thereof, duly authenticated, shall be produced by the executor, or by any other person interested in the will, with a petition for letters, the same must be filed, and the clerk of the court must appoint a time for the hearing; notice whereof must be given as hereinbefore provided for an original petition for the probate of a will. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 491), § 1323.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Alaska.** Carter's Code, sec. 151, p. 382.
- Arizona.** Rev. Stats. 1901, par. 1620.
- Colorado.** 3 Mills's Ann. Stats., sec. 4687.
- Idaho.** Code Civ. Proc. 1901, sec. 4015.
- Kansas.** Gen. Stats. 1905, § 8695.
- Montana.** Code Civ. Proc., sec. 2351.
- Nevada.** Comp. Laws, sec. 2808.
- New Mexico.** Comp. Laws 1897, sec. 2017.
- North Dakota.** Rev. Codes 1905, § 8037.
- Oklahoma.** Rev. Stats. 1903, sec. 1505.
- Oregon.** Bellinger and Cotton's Ann. Codes and Stats., § 5562.
- South Dakota.** Probate Code 1904, § 53.
- Utah.** Rev. Stats. 1898, sec. 3807.
- Washington.** Pierce's Code, § 2410.
- Wyoming.** Rev. Stats. 1899, sec. 4583.

§ 1005. **Form. Petition for probate of foreign will.**

[Title of court.]

[Title of estate.] { Department No. ____
[Title of form.]

To the Honorable the ____¹ Court of the County² of ____, State of ____.

The petition of ____, of the county³ of ____, state of ____, respectfully shows:

That ____ died on or about the ____ day of ____, 19____, at ____,⁴ in the county⁵ of ____, state of ____;

That said deceased at the time of his death was a resident of the county⁶ of ____, state of ____, and left property in the county⁷ of ____, state of ____;

That the character of the said property and probable revenue therefrom are as follows, to wit: ____;⁸

That the estate and effects in respect of which the probate of the will is herein applied for does not exceed in value the sum of _____ dollars (\$_____);

That said deceased left a will bearing date the _____ day of _____, 19____, which has been duly proved, allowed, and admitted to probate in the _____⁹ court of the county¹⁰ of _____, state of _____; that a duly authenticated copy of said will and the probate thereof in said court is presented and filed herewith; that said court at the time of admitting said will to probate was a court of competent jurisdiction, and had jurisdiction of said matters and of all parties interested in said estate;

That your petitioner is the person named in said will as executor thereof and consents to act as such executor;¹¹

That _____, aged about _____ years, residing at _____, and _____, aged about _____ years, residing at _____, are named therein as devisees and legatees;

That the next of kin of said testator, whom your petitioner is advised and believes, and therefore alleges to be, the heirs at law of said testator, and the names, ages, and residences of said heirs are as follows, to wit, —

Names.	Ages.	Residences.
_____	_____	_____
_____	_____	_____

Wherefore your petitioner prays that the said will may be admitted to probate, and that letters testamentary thereon be issued to your petitioner; that for that purpose a time be appointed for proving said will; that all persons interested be notified to appear at the time appointed for proving the same; and that all other necessary and proper orders may be made in the premises.

Dated _____, 19____.

_____, Petitioner.

_____, Attorney for Petitioner.

Explanatory notes. 1. Title of court. 2. Or, City and County. 3. Or, city and county. 4. State place. 5-7. Or, city and county. 8. State character and revenue. 9. Title of court. 10. Or, city and county. 11. Or, that _____ is named in said will as executor or executrix thereof, and refuses to act as such, and that your petitioner is a person interested in the will of said deceased.

§ 1006. Form. Notice of time and place set for hearing petition for probate of foreign will, and for the issuance of letters testamentary thereon.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Notice is hereby given, That a petition for the probate of the will of _____, deceased, and for the issuance of letters testamentary thereon to _____, has been filed in this court, and that _____,² the _____ day of _____, 19____, at _____ o'clock in the forenoon³ of said day at the court-room of said court,⁴ in said county⁵ and state, have been set as the time and place for the hearing of said petition, when and where any person interested may appear and contest the same, and show cause, if any they have, why said petition should not be granted. Said will is a foreign will, heretofore admitted to probate in the state of _____.

Dated _____, 19____.

[Seal]

_____, Clerk.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Day of week. 3. Or, afternoon. 4. Give location of court-room. 5. Or, city and county. Proceedings on production of foreign will: See § 1004, ante.

§ 1007. Form. Order fixing hearing on petition for proving foreign will, etc., and application for letters of administration with the will annexed.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

A duly authenticated copy of the last will of _____, deceased, and of the probate thereof, together with a petition for admission of the same to probate, and for the issuance to _____, of letters of administration with the will annexed, having been duly filed in this court, and a hearing thereon asked for, —

It is ordered and directed, That _____² the _____ day of _____, 19____, at _____ o'clock in the forenoon³ of said day, at the court-room of this court,⁴ in the county⁵ of _____, state of _____, be, and the same are hereby, fixed as the time and

place for the hearing upon said matters, and that notice be given thereof, by the clerk, as provided by law.

Dated ———, 19——. ———, Judge of the ——— Court.

Explanatory notes. 1. Give file number. 2. Day of week. 3. Or, afternoon. 4. State location of court-room. 5. Or, city and county.

§ 1008. **Hearing proofs of probate of foreign will.** If, on the hearing, it appears upon the face of the record that the will has been proved, allowed, and admitted to probate in any other of the United States, or in any foreign country, and that it was executed according to the law of the place in which the same was made, or in which the testator was at the time domiciled, or in conformity with the laws of this state, it must be admitted to probate, and have the same force and effect as a will first admitted to probate in this state, and letters testamentary or of administration issued thereon. **Kerr's Cyc. Code Civ. Proc., § 1324.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 151, p. 382.
Arizona.* Rev. Stats. 1901, par. 1621.
Colorado. 3 Mills's Ann. Stats., sec. 4687.
Idaho. Code Civ. Proc. 1901, sec. 4016.
Kansas. Gen. Stats. 1905, § 8696.
Montana.* Code Civ. Proc., sec. 2352.
Nevada. Comp. Laws, secs. 2807, 2808.
New Mexico. Comp. Laws 1897, sec. 2017.
North Dakota. Rev. Codes 1905, § 8037.
Oklahoma. Rev. Stats. 1903, sec. 1506.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5562.
South Dakota. Probate Code 1904, § 54.
Utah.* Rev. Stats. 1898, sec. 3808.
Washington. Pierce's Code, §§ 2410, 2411.
Wyoming.* Rev. Stats. 1899, sec. 4584.

§ 1009. **Form. Certificate of proof of foreign will and facts found.**

[Title of court.]

[Title of estate.]

{ No. ———¹ Dept. No. ———
 [Title of form.]

I, ———, Judge of the said ———² Court, do hereby certify:
 That there was produced by ———,³ a copy of the will of
 ———, and the probate thereof, in the ———⁴ court, of the

county ⁵ of —, state of —, duly authenticated, and said will, a copy of which is annexed hereto, was on the — day of —, 19—, admitted to probate in this court as the last will of —, deceased, and from the proceedings taken, and from an examination had therein on said day, the court finds as follows, —

That said — died on or about the — day of —, 19—, in the county ⁶ of —, state of —; that at the time of his death he was a resident of the county ⁷ of —, state of —; that said will, a copy of which is annexed hereto, was duly proved, allowed, and admitted to probate as the last will of —, deceased, in the —⁸ court, of the county ⁹ of —, state of —, by an order of said court duly entered therein on the — day of —, 19—; that said court, at the time of making said order, was a court of competent jurisdiction and had jurisdiction in said matter and of all persons interested in the estate of said decedent; that said will was executed according to the laws of the state of —, in which state it was made.¹⁰

In witness whereof, I have signed this certificate and caused the same to be attested by the clerk of this court under the seal thereof this — day of —, 19—. —, Judge.

[Seal]

Attest: —, Clerk of the — Court.

By —, Deputy.

Explanatory notes. 1. Give file number. 2. Title of court. 3. The executor named in the will, or a person interested in the will. 4. Title of court. 5-7. Or, city and county. 8. Title of court. 9. Or, city and county. 10. Or, according to the laws of the state of —, in which the testator was domiciled at the time of his death; or, in conformity with the laws of this state. A copy of the will should be attached to the certificate, and recorded. See *Goldtree v. McAllister*, 86 Cal. 93, 101; 23 Pac. Rep. 207; 24 Pac. Rep. 801.

§ 1010. Form. Order admitting foreign will to probate and for letters (with or without bond).

[Title of court.]

[Title of estate.]

{ No. —¹ Dept. No. —
[Title of form.]

Now comes the petitioner, —, by —, his attorney, and presents a copy of the last will of said deceased, and the probate thereof, in the county ² of —, state of —, duly

authenticated, and proves to the satisfaction of the court that the time for hearing the petition for the probate of the will, filed on the ____ day of ____, 19__, and for letters testamentary thereon ³ was by the court ⁴ duly set for hearing on the ____ day of ____, 19__, and that notice of said hearing has been duly given as required by law and the order of said court; and the matter now coming regularly on for hearing,⁵ and no person appearing to contest the said petition, the court proceeds to hear the evidence, and thereupon finds the facts alleged therein to be true, and that said petition ought to be granted; and it appearing on the face of the authenticated record of the probate of said will so presented and on file herein, that said will has been duly proved, allowed, and admitted to probate in the ____ ⁶ court of the county ⁷ of ____, state of ____, on the ____ day of ____, 19__, and that said will was executed according to the laws of the state of ____, in which the same was made,⁸ —

It is therefore adjudged and determined by the court, That ____ died testate on the ____ day of ____, 19__, a resident of the county ⁹ of ____, state of ____, leaving an estate in the county of ____, state of ____;

And it is ordered, That the instrument in writing heretofore admitted to probate in the ____ ¹⁰ court of the county ¹¹ of ____, state of ____, as the last will of said deceased, and so alleged to be in said petition, a certified copy of which is filed herein, be admitted to probate as the last will of said deceased; that ____ be appointed executor ¹² of said estate; and that letters testamentary ¹³ issue to said ____ upon his taking the oath required by law,¹⁴ without any bond being required. _____, County Clerk.

Entered ¹⁵ ____, 19__.

By ____, Deputy.

Explanatory notes. 1. Give file number. 2. Or, city and county. 3. Or, and for letters of administration with the will annexed, as the case may be. 4. Or, clerk, if authorized by statute. 5. Or, if the matter has been postponed, say; and the hearing having been regularly continued to this time. 6. Title of court. 7. Or, city and county. 8. Or, according to the laws of the state of ____, in which state the testator was domiciled at the time of his death; or, in conformity with the laws of this state. 9. Or, city and county. 10. Title of court. 11. Or, city and county. 12. Or, administrator with the will annexed, as the case may be. 13. Or, of administration

with the will annexed. 14. If bonds are not waived, say; and giving bond in the sum of _____ dollars (\$_____). 15. Orders or decrees need not be signed: See § 77, ante.

PROBATE OF FOREIGN WILLS.

- | | |
|--------------------------------|------------------------------------|
| 1. In general. | 4. Instrument when not entitled to |
| 2. Jurisdiction of courts. | probate as such. |
| 3. Effect of foreign judgment. | 5. Issues to be determined. |

1. **In general.** A will executed in a foreign country, by a person domiciled there, is not required to be first proved in the foreign country before it is provable in the state in which the decedent left his property: *Clayson v. Clayson*, 26 Wash. 253; 66 Pac. Rep. 410. The domicile of a testator is the place of his permanent home, and involves a question of fact and intent. In this respect, it differs from residence, which may or may not be his place of permanent residence or domicile. The person may have many places of residence, but in the law only one place of domicile: *Pickering v. Winch (Or.)*, 87 Pac. Rep. 763.

REFERENCES.

Statutes providing for the allowance or recording of wills admitted to probate in another jurisdiction, upon the production of a duly authenticated copy, do not apply where the testator's domicile at the time of his death was within the state: See note 1 L. R. A. (N. S.) 996. Probate of foreign wills, proceedings and proof on production of: See notes *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1322, 1323, 1324. Probate of foreign wills: See note 113 Am. St. Rep. 211-216.

2. **Jurisdiction of courts.** Each state has primary power, with respect to the administration and disposition of the estates of deceased persons, as to all property of such persons found within its jurisdiction. Thus the courts of a state may and do grant original probate of wills of deceased non-residents who leave property within that state. In California, this is expressly provided for, by statute, and the rule in many of the other states is the same: *Estate of Clark*, 148 Cal. 108; 82 Pac. Rep. 760.

3. **Effect of foreign judgment.** A judgment admitting the will to probate is valid in all other states only as to the property within the jurisdiction of the court pronouncing the judgment. It has no extra-territorial force, establishes nothing beyond that, and does not dispense with, nor abrogate, the formalities and proofs which may be exacted by other jurisdictions in which the deceased also left property subject to their laws of administration: *Estate of Clark*, 148 Cal. 108, 112; 82 Pac. Rep. 760; 113 Am. St. Rep. 197; 1 L. R. A. (N. S.) 996; 7 Am. & Eng. Ann. Cas. 306. Under the Oregon statute, if a will pertaining to realty in that state, is probated elsewhere, certified copies of the will and probate may be recorded in the same manner as wills

executed and probated in that state, and are thereafter entitled to be admitted in evidence in the same manner and with like effect. Where, however, a will is not attested in the manner required by the laws of that state, it is not entitled to probate, and is wholly insufficient as a muniment to convey title to such realty: *Montague v. Schieffelin*, 46 Or. 413; 80 Pac. Rep. 654, 655. It is held, in a Montana case, that a decree of the California court admitting a will to probate, even though the will devises real estate situated in Montana, is conclusive upon the courts of Montana having probate jurisdiction; and the questions of the testamentary capacity of the testator and his freedom from duress, fraud, misrepresentation, or undue influence, when executing such foreign will, are foreclosed by the decree of the foreign court upon proceedings on a contest of the same will in the domestic court: *State v. District Court*, 34 Mont. 96; 85 Pac. Rep. 866, 869.

REFERENCES.

Ancillary probate of will of resident which has been probated abroad: See note 7 Am. & Eng. Ann. Cas. 313. Conclusiveness of foreign probate as affecting real property: See note 6 L. R. A. (N. S.) 617-620. Effect of probate of will in another state: See note 73 Am. Dec. 53-62; 48 L. R. A. 130-153. Foreign will probated abroad, conclusiveness of, in domestic courts: See note 9 Am. & Eng. Ann. Cas. 422.

4. Instrument when not entitled to probate as such. Where a testator, a resident of this state, while temporarily absent from the state, executes a will in another state, which will is in conformity with the laws of both this and the foreign state, such will is entitled to be admitted to probate, originally, in the superior court of the county in this state in which the testator had his residence, and is not entitled to admission as a foreign will: *Estate of Clark*, 148 Cal. 108, 110; 82 Pac. Rep. 760; 113 Am. St. Rep. 197; 1 L. R. A. (N. S.) 996; 7 Am. & Eng. Ann. Cas. 306. It is the duty of the court, in probate, to refuse to probate a will offered as a foreign will, if the court is satisfied, from the evidence, that the testator was, in fact, a resident of this state at the time of his death: *Estate of Clark*, 148 Cal. 108; 82 Pac. Rep. 760, 763.

5. Issues to be determined. When a foreign will is offered for probate, under the California statute, two questions are open, as new and original questions for the determination of the probate court: 1. The sufficiency of the proofs of foreign probate. 2. The question of the residence of the deceased. For, if, upon the question of residence, it should be determined that the testator was in truth a resident of this state, it follows, of necessity, that the domestic state court has exclusive, original, and primary jurisdiction to admit the will to probate, and will not admit it as a foreign will on ancillary proceedings: *Estate of Clark*, 148 Cal. 108; 82 Pac. Rep. 760, 762.

CHAPTER IV.

CONTESTING WILL AFTER PROBATE.

- § 1011. Contest of probate within one year.
- § 1012. Form. Petition to revoke the probate of a will.
- § 1013. Form. Petition to revoke probate of will and for probate of later will.
- § 1014. Citation to be issued to interested parties.
- § 1015. Form. Order, on application to revoke probate of will, that a citation issue.
- § 1016. Form. Citation on application to revoke probate of will.
- § 1017. Trial of issues of fact.
- § 1018. Petition to revoke probate of will. How tried. Judgment.
- § 1019. Form. Order revoking probate of will.
- § 1020. Revocation of probate. Effect of.
- § 1021. Costs and expenses, by whom paid.
- § 1022. Probate, when conclusive.

CONTEST AFTER PROBATE.

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| 1. In general. | 12. Heirs and insane persons as witnesses. |
| 2. Parties. | 13. Effect of revocation of probate. |
| 3. What motion is a contest. | 14. Costs in contest after probate. |
| 4. Time. Limitation of action. | 15. Nonsuit and dismissal. |
| (1) In general. | 16. Collateral attack. |
| (2) Effect of amending petition. | 17. Right to maintain second contest. |
| (3) Delay in prosecuting contest. | 18. Contest of foreign will. |
| 5. Estoppel to contest. | 19. Appeal. |
| 6. Intervention. | (1) In general. |
| 7. Pleadings. | (2) Right of appeal. |
| 8. Issues. | (3) Findings. |
| 9. Trial of issues by jury. | (4) Consideration on appeal. |
| 10. Burden of proof. | |
| 11. Evidence. Presumptions. | |

§ 1011. **Contest of probate within one year.** When a will has been admitted to probate, any person interested may, at any time within one year after such probate, contest the same or the validity of the will. For that purpose he must file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked. **Kerr's Cyc. Code Civ. Proc., § 1327.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska. Carter's Code, sec. 152, p. 382.
 Arizona.* Rev. Stats. 1901, par. 1622.
 Idaho.* Code Civ. Proc. 1901, sec. 4017.
 Kansas. Gen. Stats. 1905, § 8689.
 Montana.* Code Civ. Proc., sec. 2360.
 New Mexico.* Comp. Laws 1897, sec. 1985.
 North Dakota. Rev. Codes 1905, § 8014.
 Oklahoma. Rev. Stats. 1903, sec. 1507.
 Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 1108, 5563.
 South Dakota. Probate Code 1904, § 55.
 Utah. Rev. Stats. 1898, sec. 3796.
 Washington. Pierce's Code, § 2395.
 Wyoming.* Rev. Stats. 1899, sec. 4607.

§ 1012. Form. Petition to revoke the probate of a will.

[Title of court.]

[Title of estate.]

 { No. ____¹ Dept. No. ____
 [Title of form.]

To the Honorable the ____² Court of the County³ of ____,
 State of ____.

The undersigned, your petitioner, respectfully alleges:

That ____ died in the county⁴ of ____, state of ____, on the ____ day of ____, 19__; that, at the time of his death, he was a resident of said county⁵ and state; that on the ____ day of ____, 19__, an order of this court was made admitting to probate a certain written instrument dated ____, 19__, purporting to be the last will of said ____, deceased; that on the ____ day of ____, 19__, said court made an order appointing said ____, executor of said will; that letters testamentary were issued to the said ____; that the said ____, qualified as executor; and that he is now administering said estate;

That your petitioner is a son⁶ of decedent, and is informed and believes, and upon such information and belief alleges the fact to be, that such written instrument admitted to probate as aforesaid was, and is now, the last will of said deceased; but avers that the petitioner for probate had, at the time of such proof, and still has, in his possession another will of said deceased made by him after he signed the instrument admitted to probate as aforesaid.⁷

Wherefore petitioner prays that both the order authorizing the issuance of letters testamentary to said executor, and the probate of said pretended will, be revoked and set aside.

_____, Attorney for Petitioner. _____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4, 5. Or, city and county. 6. Or, other person interested in said estate. 7. Or, that the instrument was forged, and that the signature of decedent thereto was falsely and fraudulently signed by another after the former's death. Give particulars as to any other will in the possession of the petitioner for probate, or any will discovered since the probate of the former will, etc.

§ 1013. Form. Petition to revoke probate of will and for probate of later will.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.] }

To the Honorable the ____² Court of the County³ of _____,
State of _____.

The undersigned, your petitioner, respectfully alleges:

That _____ died in the county⁴ of _____, state of _____, on the _____ day of _____, 19____; that, at the time of his death, he was a resident of said county⁵ and state; that on the _____ day of _____, 19____, an order of this court was made admitting to probate a certain written instrument, dated _____, 19____, purporting to be the last will of said _____, deceased; that on the _____ day of _____, 19____, said court made an order appointing _____ executor of said purported last will; that letters testamentary were issued to the said _____; that the said _____ qualified as such executor; and that he is now acting professedly as executor of the said purported last will of said deceased;

That said written instrument was not the last will and testament of said decedent; that since the entry of said orders, another, a later, and the last will of said decedent, dated _____, 19____, has been discovered; that said last-named last will was duly published by decedent, in his lifetime, and authenticated as required by law; and that the same is now presented to this court for probate and filed herewith;

That said —, at the time of his death, left property in the said county ⁶ of —, state of —; that the character of said property and probable revenue therefrom are as follows, to wit, —; ⁷ and that the estate and effects in respect to which the probate of the will is herein applied for do not exceed in value the sum of — dollars (\$—). ⁸

That your petitioner is an heir at law ⁹ of said decedent, and interested in the estate left by him;

That petitioner is named in the said last-named last will and testament as executor thereof, and that he consents to act as such executor; ¹⁰

That the names, ages, and residences of the devisees and legatees under said will are as follows, to wit, —

Names.	Approximate Ages.	Residences.
—	—	—
—	—	—

That the subscribing witnesses to the said last-named last will and testament are —, residing in the county ¹¹ of —, state of —, and —, residing in the county ¹² of —, in said state;

That the next of kin of said testator, whom your petitioner is advised and believes, and therefore alleges to be, the heirs at law of said testator, and the names, ages, and residences of said heirs, so far as known to your petitioner, are as follows, to wit, —

Names.	Approximate Ages.	Residences.
—	—	—
—	—	—

That at the time said last-named last will was executed, to wit, on the — day of —, 19—, the said testator was over the age of eighteen (18) years, to wit, of the age of — (—) years, or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, and was in every respect competent, by last will, to dispose of all his estate;

That said will is in writing, signed by the said testator and attested by said subscribing witnesses, at the request of said

testator, subscribing their names to the said will in the presence of said testator and in the presence of each other, and your petitioner is advised, and therefore alleges, that said witnesses, at the time of attesting the execution of said will, were and are now competent.

Wherefore your petitioner prays that the probate of said written instrument, hereinbefore first referred to, be revoked; that the letters testamentary issued to said — as aforesaid also be revoked; that the written instrument hereinbefore referred to as the last will of said deceased, and dated the — day of —, 19—, be admitted to probate; and that letters testamentary thereon be issued to petitioner, the person named therein as executor thereof. —, Petitioner.

—, Attorney for Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4-6. Or, city and county. 7. State revenue. 8. Give value. 9. Or, legatee, or devisee, or other person interested in the estate. 10. Or, renounces his right to letters testamentary. 11, 12. Or, city and county.

§ 1014. Citation to be issued to interested parties. Upon filing the petition, and within one year after such probate, a citation must be issued to the executor of the will, or to the administrator with the will annexed, and to all the legatees and devisees mentioned in the will, and heirs residing in the state, so far as known to the petitioner or to their guardians, if any of them are minors, or to their personal representatives, if any of them are dead, requiring them to appear before the court on some day therein specified, to show cause why the probate of the will should not be revoked. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 492), § 1328.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1623.

Idaho. Code Civ. Proc. 1901, sec. 4018.

Montana. Code Civ. Proc., sec. 2361.

New Mexico. Comp. Laws 1897, sec. 1986.

North Dakota. Rev. Codes 1905, § 8014.

Oklahoma. Rev. Stats. 1903, sec. 1508.

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South Dakota. Probate Code 1904, § 56.

Utah. Rev. Stats. 1898, sec. 3797.

Washington. Pierce's Code, § 2396.

Wyoming. Rev. Stats. 1899, sec. 4608.

§ 1015. Form. Order, on application to revoke probate of will, that a citation issue.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

____, one of the legatees² under the will of said deceased, having filed in this court a petition, praying that the probate of said will be revoked, —

It is ordered, That a citation issue to _____, the executor of said will, and to _____, _____, and _____, all the legatees and devisees mentioned in said will, and to _____, _____, and _____, all his heirs at law residing in this state, so far as known, directing them to appear in this court, at the court-room thereof, at _____,³ on the _____ day of _____, 19____, at the hour of _____ o'clock in the forenoon⁴ of said day, and show cause, if any they can, why the probate of said will should not be revoked.

Dated _____, 19____. _____, Judge of the _____ Court.

Explanatory notes. 1. Give file number. 2. Or, heir at law, or other person interested. 3. State location of court-room. 4. Or, afternoon, as the case may be.

§ 1016. Form. Citation on application to revoke probate of will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To _____, the executor of the last will of _____, deceased, _____, _____, and _____, legatees and devisees mentioned in said will, and _____, _____, and _____, heirs at law of said decedent, —

You and each of you are hereby notified, That _____ has filed, in the above-entitled court, a petition to have the will of said deceased revoked; and

You are hereby cited to appear before said court, at the court-room thereof, at ———, ² on the ——— day of ———, 19——, at the hour of ——— o'clock in the forenoon of said day, and show cause, if any you have, why the probate of said will should not be revoked. ———, Clerk of the ——— Court.

[Seal]

By ———, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. State location of court-room. 3. Or, afternoon.

§ 1017. Trial of issues of fact. At the time appointed for showing cause, or at any time to which the hearing is postponed, proof having been made of service of the citation upon all of the persons named therein, the court must proceed to try the issues of fact joined in the same manner as an original contest of a will. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 492), § 1329.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 1624.

Idaho. Code Civ. Proc. 1901, sec. 4019.

Kansas. Gen. Stats. 1905, § 8690.

Montana. Code Civ. Proc., sec. 2362.

New Mexico. Comp. Laws 1897, sec. 1987.

North Dakota. Rev. Codes 1905, § 8014.

Oklahoma. Rev. Stats. 1903, sec. 1510.

South Dakota. Probate Code 1904, § 58.

Wyoming. Rev. Stats. 1899, sec. 4609.

§ 1018. Petition to revoke probate of will. How tried. Judgment. In all cases of petitions to revoke the probate of a will, wherein the original probate was granted without a contest, on written demand of either party, filed three days prior to the hearing, a trial by jury must be had, as in cases of the contest of an original petition to admit a will to probate. If, upon hearing the proofs of the parties, the jury shall find, or, if no jury is had, the court shall decide, that the will is for any reason invalid, or that it is not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked. **Kerr's Cyc. Code Civ. Proc.**, § 1330.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1625.**Colorado.** 3 Mills's Ann. Stats., sec. 4690.**Idaho.*** Code Civ. Proc. 1901, sec. 4020.**Montana.*** Code Civ. Proc., sec. 2363.**New Mexico.** Comp. Laws 1897, secs. 1987, 1988.**North Dakota.** Rev. Codes 1905, § 8014.**Washington.** Pierce's Code, § 2399.**Wyoming.** Rev. Stats. 1899, sec. 4610.**§ 1019. Form. Order revoking probate of will.**

[Title of court.]

[Title of estate.]

{	No. ____ ¹	Dept. No. ____
	[Title of form.]	

This court having, on the ____ day of ____, 19__, admitted to probate a certain instrument in writing as the last will of ____, deceased, and having directed letters testamentary thereon to issue to ____; and the petition of ____, heretofore filed herein, wherein he contests the validity of said written instrument, and prays that its probate as the last will of said ____, deceased, be revoked, coming on regularly this day² to be heard;

And it being shown to the court that a citation was duly issued to said ____, and to all persons interested in said estate, residing in this state, requiring them to show cause, at a time and place specified in said citation, why the probate of said will should not be revoked; and that said citation was duly served upon all the parties named;

And it appearing that all necessary and proper orders in the premises have been made; that all of said parties have appeared herein as required in said citation; and that an answer to said petition has been filed,³ the court proceeds to hear the allegations and proofs of the parties, and, after such hearing, no jury having been demanded, finds that said petition was filed within the time prescribed by law; and that said written instrument was not executed and attested in the manner required by law⁴ and is not the last will of ____, deceased:

It is therefore ordered, That the said probate of said will, and the letters testamentary issued thereon be, and the same are hereby, annulled and revoked; that the costs of all the parties to this proceeding and the expenses thereof be paid by the said executor out of the estate of said deceased; that said petitioner, —, be, and he is hereby, appointed administrator de bonis non of said estate; and that letters issue to him upon his taking the oath required by law and giving bond in the sum of — dollars (\$—).

Entered * —, 19—.

—, County Clerk.

By —, Deputy.

Explanatory notes. 1. Give file number. 2. Or, having been continued to the present time by order of the court. 3. If a jury has been demanded, as authorized by law, and the findings and verdict are that said instrument was not the last will and testament of —, deceased, continue down to the order as follows; and a jury, having been demanded, "was impaneled and sworn, and proceeded to try the issues presented by said petition and the answer thereto; and the findings and verdict of said jury having been filed, in pursuance of said findings and verdict," it is ordered, etc. 4. Or, is a forged instrument, falsely and fraudulently made by —, after the testator's death; or otherwise, according to the fact. 5. Orders or decrees need not be entered: See § 77, ante.

§ 1020. **Revocation of probate. Effect of.** Upon the revocation being made, the powers of the executor or administrator with the will annexed, must cease; but such executor or administrator shall not be liable for any act done in good faith previous to the revocation. **Kerr's Cyc. Code Civ. Proc., § 1331.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1626.

Colorado. 3 Mills's Ann. Stats., sec. 4696.

Idaho.* Code Civ. Proc. 1901, sec. 4021.

Montana.* Code Civ. Proc., sec. 2364.

New Mexico. Laws 1901, sec. 5, p. 151.

North Dakota. Rev. Codes 1905, §§ 8014, 8061.

Oklahoma. Rev. Stats. 1903, sec. 1511.

South Dakota.* Probate Code 1904, § 59.

Washington. Pierce's Code, § 2400.

Wyoming.* Rev. Stats. 1899, sec. 4611.

§ 1021. **Costs and expenses, by whom paid.** The fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation, or out of the property of the decedent, as the court directs. **Kerr's Cyc. Code Civ. Proc., § 1332.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1627.
Idaho.* Code Civ. Proc. 1901, sec. 4022.
Montana.* Code Civ. Proc., sec. 2365.
New Mexico. Comp. Laws 1897, sec. 1987.
North Dakota. Rev. Codes 1905, § 8014.
Oklahoma.* Rev. Stats. 1903, sec. 1512.
South Dakota.* Probate Code 1904, § 60.
Washington. Pierce's Code, § 2401.
Wyoming.* Rev. Stats. 1899, sec. 4612.

§ 1022. **Probate, when conclusive.** If no person, within one year after the probate of a will, contest the same or the validity thereof, the probate of the will is conclusive; saving to infants and persons of unsound mind, a like period of one year after their respective disabilities are removed. **Kerr's Cyc. Code Civ. Proc., § 1333.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1628.
Colorado. 3 Mills's Ann. Stats., sec. 4689.
Idaho.* Code Civ. Proc. 1901, sec. 4023.
Kansas. Gen. Stats. 1905, §§ 8688, 8692.
Montana.* Code Civ. Proc., sec. 2366.
New Mexico. Comp. Laws 1897, sec. 1991.
North Dakota. Rev. Codes 1905, § 8015.
Oklahoma.* Rev. Stats. 1903, sec. 1513.
South Dakota.* Probate Code 1904, § 61.
Washington. Pierce's Code, § 2397.
Wyoming.* Rev. Stats. 1899, sec. 4613.

CONTEST AFTER PROBATE.

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| 1. In general. | 12. Heirs and insane persons as witnesses. |
| 2. Parties. | 13. Effect of revocation of probate. |
| 3. What motion is a contest. | 14. Costs in contest after probate. |
| 4. Time. Limitation of action. | 15. Nonsuit and dismissal. |
| (1) In general. | 16. Collateral attack. |
| (2) Effect of amending petition. | 17. Right to maintain second contest. |
| (3) Delay in prosecuting contest. | 18. Contest of foreign will. |
| 5. Estoppel to contest. | 19. Appeal. |
| 6. Intervention. | (1) In general. |
| 7. Pleadings. | (2) Right of appeal. |
| 8. Issues. | (3) Findings. |
| 9. Trial of issues by jury. | (4) Consideration on appeal. |
| 10. Burden of proof. | |
| 11. Evidence. Presumptions. | |

1. In general. A contest of a will, in proceedings to revoke its probate, is a special proceeding: *Estate of Joseph*, 118 Cal. 660; 50 Pac. Rep. 768; *Carpenter v. Jones*, 121 Cal. 362; 53 Pac. Rep. 842; *Estate of Dolbeer (Cal.)*, 96 Pac. Rep. 266, 268. A suit to contest a will is a proceeding in rem. The court acquires jurisdiction of the res, and its decree affects the interest therein of all parties who, in fact, have an interest in it: *Maurer v. Miller (Kan.)*, 93 Pac. Rep. 596, 597. The California statute does not give the right to contest a will, after its probate, upon the ground that the court did not have jurisdiction: *Estate of Dole*, 147 Cal. 188; 81 Pac. Rep. 534, 537. The inauguration of the contest of a will admitted to probate does not set the order admitting the will to probate at large. That can only be effected by a successful contest. Upon such contest, the court is not required to take evidence again as to the due execution of the will: *Estate of McKenna*, 143 Cal. 580; 77 Pac. Rep. 461, 465. It is not necessary that the undue influence alleged as a ground of contest should have been exercised by a beneficiary under the will. Undue influence by any one, whether he gains by the will or not, is sufficient ground for setting it aside: *Estate of Cahill*, 74 Cal. 52; 15 Pac. Rep. 364, 366.

REFERENCES.

Citation to be issued to parties interested, executors or administrators, etc., upon filing a contest of will after probate: See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1328.

2. Parties. A son who conveys all his prospective right, title, interest, and estate as heir, legatee, or devisee, of his mother in and to all of the property of which she might die possessed, and who agreed that he would not thereafter assert any right, title, or interest, as

heir or otherwise, to such estate, nor in any manner, or to any extent, dispute or contest any disposition of her property made by deed, contract, or will, is not a party interested in proceedings to revoke the probate of the will of the deceased, and a judgment dismissing the petition of such party is proper: *Estate of Wickersham* (Cal.), 96 Pac. Rep. 311, 312. A conveyance of a prospective interest in the estate of an ancestor, and an agreement not to contest any disposition thereof made by the will of such ancestor, is not against public policy, but is valid and binding, if founded on an adequate consideration: *Estate of Garcelon*, 104 Cal. 570; 38 Pac. Rep. 414; 32 L. R. A. 595; 43 Am. St. Rep. 134; *Estate of Wickersham* (Cal.), 96 Pac. Rep. 311, 314. The state may protect and preserve its contingent interest in an estate by contesting a supposititious will. It is sufficient, if the interest is dependent upon a condition, or is a contingent interest: *State v. District Court*, 25 Mont. 355; 65 Pac. Rep. 120, 122.

3. What motion is a contest. A motion by an alleged heir, asking for an order declaring invalid and void a devise under the will to another person, and praying for final settlement of the executor's accounts and distribution over to the applicant, of all of the estate, is, in effect, a contest of the will, and, where the statute gives the district court exclusive jurisdiction of actions brought to contest wills, the probate court has no jurisdiction to hear or to decide such motion: *Dean v. Swayne*, 67 Kan. 241; 72 Pac. Rep. 780, 781.

4. Time. Limitation of action.

(1) **In general.** Where a will is admitted to probate without contest, any person interested may, within one year, initiate a contest, and if, upon a hearing, it appears that the will is invalid, or not sufficiently proved to be the last will of the testator, the probate must be annulled and revoked; and, where annulled, it must be set aside in toto as to all parties interested thereunder: *Clements v. McGinn* (Cal.), 33 Pac. Rep. 920, 922; distinguishing the rule in *Samson v. Samson*, 64 Cal. 327; 30 Pac. Rep. 979, and citing and reviewing *Estate of Freud*, 73 Cal. 555; 15 Pac. Rep. 135. A will is not open to contest, under the Kansas statute, where it was probated, and its validity established, more than two years before the attack was made. Besides, where the matter of probate is within the jurisdiction of the probate court, its judgment in the premises is not open to collateral attack: *Keeler v. Lauer*, 73 Kan. 388; 85 Pac. Rep. 541, 544.

REFERENCES.

Contesting will after probate; limitation of time: See note **Kerr's** Cal. Cyc. Code Civ. Proc., § 1327.

(2) **Effect of amending petition.** Amendments to the petition of the contestant may be made to correspond with the proof, even after the close of the evidence of the contestant, and the deficiency in the contestant's case may be thus corrected upon a motion for a nonsuit, where no objection, other than that the contestant had closed his case, was made to the amendment: *Richardson v. Moore*, 30 Wash. 406; 71 Pac. Rep. 18, 19. In an action to vacate the probate of a will, where the contestants filed an amendment to their contest, setting up facts which they claimed to have constituted undue influence, and where such statements were of entirely new matters, constituting another and independent cause of contest, which could have been presented only within a year after the probate, a demurrer thereto should be sustained, or such amendment should be stricken out or disregarded where filed after the expiration of the year allowed by the statute in which to institute the proceeding: *Estate of Wilson*, 117 Cal. 262; 49 Pac. Rep. 172, 173. The contestants of a will do not have to file their petition within one year from the date of the entry of a void decree: *Estate of Sullivan*, 40 Wash. 202; 82 Pac. Rep. 297, 299. The mere fact that a petition to contest a will was stricken out, and an amendment permitted, after the year expires, does not make it a contest instituted after the year, where the court already has jurisdiction of the subject-matter and of the parties, by permitting the amendment, and where, by virtue of the statute allowing it, jurisdiction is retained. Therefore, a court errs in dismissing a contestant's amended petition on the ground that the contest was not instituted within one year of the probate of the will, where such facts exist: *Estate of Sullivan*, 40 Wash. 202; 82 Pac. Rep. 297, 299. Where an action to set aside a will is commenced within the statutory period, the action is not barred because an amendment to the petition was made after the period had run, where the amendment was merely formal: *Hoffman v. Steffey*, 10 Kan. App. 574; 61 Pac. Rep. 822.

(3) **Delay in prosecuting contest.** Where a petition for the revocation of the probate of a will is filed but three days before the expiration of the year after probate, prescribed by statute in which the same may be filed, and where citation was not issued thereon for an unreasonable period after the filing, such delay makes a prima facie case of a lack of diligence on the part of the contestant, and furnishes ample grounds for the dismissal of the petition: *Estate of Focha* (Cal. App.), 97 Pac. Rep. 321, 322. When amendments to a petition for the revocation of the probate of a will are not offered until after the expiration of a year from probate, their denial should not be reversed, unless the circumstances show a very extreme abuse of discretion, and especially is this true where the offered amendments, if allowed, would not have supplied the defects of the original petition: *Estate of Sheppard*, 149 Cal. 219; 85 Pac. Rep. 312, 313.

5. Estoppel to contest. If an heir receives property distributed by a decree to which he was a party, and has received all the benefits provided in the will for him, he is estopped from contesting the validity of the will: *Curtis v. Underwood*, 101 Cal. 661; 36 Pac. Rep. 110, 112. The rule that where a legatee receives property under the will, he is estopped to deny its validity, has no application if he acted in ignorance of his rights in the premises: *Medill v. Snyder*, 61 Kan. 15; 58 Pac. Rep. 962, 963. Where the widow, instead of instituting any contest, accepted her legacy under the will, and for an additional valuable consideration, released all claims against her husband's estate, she was thenceforth estopped by these acts from contesting the will, or asserting the invalidity of any provision thereof in the courts of any state: *Rader v. Stubblefield*, 43 Wash. 334; 86 Pac. Rep. 560, 564. The law will not permit an heir, who voluntarily permits the time allowed by law to contest a will to expire, to profit by a successful contest instituted by one whose time has not elapsed: *Spencer v. Spencer*, 31 Mont. 631; 79 Pac. Rep. 320, 321.

6. Intervention. A person claiming to be an heir, and interested in the property of the estate, may properly intervene in an action brought to contest the will, to which he was not made a party. This right to intervene and to prosecute the suit to its end, is independent of the right of the plaintiff, and does not depend solely upon the plaintiff's right to maintain the action: *Maurer v. Miller* (Kan.), 93 Pac. Rep. 596, 597. Where an action to set aside a will is commenced within the period of the statute, and an heir, after the running of the statute, intervened in the action, and the original plaintiff subsequently abandoned the same, the commencement of the original suit, within the time allowed from the probate of the will, inures to the benefit of the intervenor, and the statute of limitations, therefore, furnishes no defense to the intervening petition: *Maurer v. Miller* (Kan.), 93 Pac. Rep. 596, 598.

7. Pleadings. An averment in a petition for the revocation of the probate of a will as follows; "that at the time of signing said supposed will by him the said James Crozier was not of sound and disposing mind, but, on the contrary, said deceased was at said time of unsound mind," is a sufficient averment as against a demurrer: *Estate of Crozier* (Cal.), 4 Pac. Rep. 412.

8. Issues. In the contest of a will which has been duly admitted to probate, the same rule governs with regard to issues framed by the pleadings, upon which no evidence is offered, as applies in actions generally. Under this rule, the contestants have the burden of proof to show non-execution, and, where they fail to introduce evidence upon that issue, the presumption from this failure is against them, and it

is the duty of the court to find in favor of the due execution upon this presumption: *Estate of McKenna*, 143 Cal. 580; 77 Pac. Rep. 461, 466. The proponent, upon the contest of a will, cannot be allowed to object to the form of issues, where he had stipulated as to such issues, unless they are so uncertain as to render it impossible to say what the jury meant by their verdict: *Estate of Cahill*, 74 Cal. 52; 15 Pac. Rep. 364, 366.

9. *Trial of issues by jury.* The right to a trial by jury, secured by the constitution, has no reference to, or bearing upon, proceedings in probate. A contestant in a proceeding for the contest of a will is not legally, or of right, entitled to a jury. The right to a jury trial exists only in those probate proceedings where the statute expressly confers a right to a trial by jury: *Estate of Dolbeer* (Cal.), 96 Pac. Rep. 266, 268. The jury, in a proceeding for the revocation of the probate of a will upon the ground of undue influence, is, subject to the revisory power of the court, the judge of the facts. The jury is to regard the testimony, and to draw all reasonable inferences therefrom: *In re Welch's Will*, 6 Cal. App. 44; 91 Pac. Rep. 336, 337. In determining whether or not, in a proceeding to contest a will, the evidence produced by the contestant is sufficient to require a submission of the case to the jury, the same rules apply as in civil cases, and every favorable inference fairly deducible, and every favorable presumption fairly arising, from the evidence produced, must be considered as facts proved in favor of the contestants. Upon the contestants' motion to submit the issues of fact, where the evidence is reasonably susceptible of two constructions, or if either of several inferences may reasonably be made, the court must take the view most favorable to the contestants. All evidence in favor of the contestants must be taken as true, and, if contradictory evidence has been given, it must be disregarded. If there is any substantial evidence tending to prove, in favor of the contestants, all the facts necessary to make out their case, they are entitled to have the case go to the jury for a verdict on the merits: *Estate of Arnold*, 147 Cal. 583; 82 Pac. Rep. 252; cited and approved in *In re Welch's Will*, 6 Cal. App. 44; 91 Pac. Rep. 336, 337. Under the Washington statute, a jury in a will contest is merely advisory to the court. Its verdict, upon any question of facts submitted in a case of this kind, would not be binding upon the court. Consequently, it is in the court's discretion to dispense with the jury at any time it deems proper: *Rathjens v. Merrill*, 38 Wash. 442; 80 Pac. Rep. 754, 757.

REFERENCES.

Petition to revoke probate, when tried by jury: See note *Kerr's Cal. Cyc. Code Civ. Proc.*, § 1330.

10. Burden of proof. Where it is claimed that the will in contest has been revoked and superseded by a later one, it is incumbent upon the parties seeking revocation, to prove, by competent testimony, that the instrument of a later date, purporting to be a will, and to have the effect of revoking an earlier one, admitted to be valid, was executed with all the formality prescribed by the statute in the making of a will. They must first show the existence of such an instrument; that it was made in writing by the testator when he was of sound mind and memory; that it was signed by him, at the end thereof, or by some person in his presence, and by his express direction, and attested and subscribed, in his presence, by at least two competent witnesses, who saw the testator subscribe, or heard him acknowledge the same; and that such instrument either, in express terms, revoked the former will, or that its provisions, in devising the property, were so far inconsistent with the earlier will that it would operate as a revocation: *Caeman v. Van Harke*, 3 Kan. 333; 6 Pac. Rep. 620. In a contest of a will, the burden is upon the plaintiffs or contestants to show that the will was invalid by reason of facts alleged as to the manner of the execution, unsoundness of mind, or undue influence at the time the testator made the will. The order admitting the will to probate is not conclusive of facts necessary to support it, but, when the facts appear of record, they must be taken as true until the contrary is shown: *Higgins v. Nethery*, 30 Wash. 239; 70 Pac. Rep. 489, 490. Upon the contest of a will theretofore admitted to probate, the burden of proof, to establish every affirmative and negative allegation of facts contained in the contestant's petition, rests upon the contestants, and the proponents are not required to establish the will, *prima facie*, before the contestants are required to introduce any evidence in support of their case: *Hunt v. Phillips*, 34 Wash. 362; 75 Pac. Rep. 970, 971.

11. Evidence. Presumptions. Upon the contest of a will after the same is admitted to probate, it is presumed that the testator was of sound and disposing mind: *Estate of Dole*, 147 Cal. 188; 81 Pac. Rep. 534, 535. The presumption of the sanity of the testator is evidence in favor of the proponent of his will upon the trial, and the proponent may rely on that presumption: *Estate of Johnson* (Cal.), 93 Pac. Rep. 1015, 1017.

REFERENCES.

Parol evidence, admissibility of, to show whether living child was unintentionally omitted from will: See note 8 Am. & Eng. Ann. Cas. 637. Opinions of subscribing witnesses as to testamentary capacity: See note 39 L. R. A. 715-722. Subscribing witnesses, their competency, and the effect of their testimony opposing, or supporting, a will: See note 77 Am. St. Rep. 459-480. Evidence upon contest of wills generally: See notes *Kerr's Cal. Cyc. Civ. Code*, §§ 1270, 1272.

12. Heirs and insane persons as witnesses. Under the Kansas statute, the heirs of a deceased person are incompetent to testify, in a contest of the will, in respect to communications had personally with the deceased: *Wehe v. Mood*, 68 Kan. 373; 75 Pac. Rep. 476. An insane person is competent to be a witness, upon the contest of a will, if he understands the nature of an oath and has sufficient mental power to give a correct account of what he has seen or heard. The question whether a person, who is offered as a witness, is insane at the time goes to the competency of the witness, and is a preliminary question to be decided by the court. A discharge of the witness from an asylum for the insane is *prima facie* evidence of restoration to reason: *Clements v. McGinn* (Cal.), 33 Pac. Rep. 920, 923.

13. Effect of revocation of probate. Upon the revocation of the probate of a will, the letters of administration with the will annexed issued thereon, cease to have any effect, and the estate is subject to administration as if the deceased had died intestate: *Estate of Graves*, 6 Cal. App. 716, 718; 96 Pac. Rep. 792, 793. If the probate of an alleged will, and of letters testamentary, is revoked, and the executor appeals, the statute keeps alive, *ad interim*, appellant's character as executor for the purposes of appeal; but in all other respects, the powers and functions of the executor are suspended when the revocation is entered: *Estate of Crozier*, 65 Cal. 332; 4 Pac. Rep. 109, 110.

REFERENCES.

Effect of revocation of probate: See note *Kerr's Cal. Cyclopedia Civ. Proc.*, § 1331.

14. Costs in contest after probate. Where there is a successful contest after probate, and the legatees or executors acted in good faith, and upon probable grounds in proposing the will for probate, the court may, in its discretion, allow to the unsuccessful proponents, their ordinary costs incurred in endeavoring to establish the will, and make the same a charge against the assets of the estate: *Estate of Olmstead*, 120 Cal. 452; 52 Pac. Rep. 804. In a successful contest, after probate, the court may also, in its discretion, allow the executors, out of the estate, their reasonable costs and expenditures in endeavoring to uphold the will of which they had been appointed executors: *Estate of McKinney*, 112 Cal. 447; 44 Pac. Rep. 743; *Estate of Bump*, 152 Cal. 271; 92 Pac. Rep. 642. The court has power to make the costs of an unsuccessful contest payable out of the assets of the estate; and, in the absence of any showing to the contrary, the appellate court must presume that the action of the court below was properly exercised: *Estate of Bump*, 152 Cal. 271; 92 Pac. Rep. 642.

15. Nonsuit and dismissal. Where the evidence fails to prove a sufficient case to justify a verdict or findings upon an application to

revoke the probate of a will, it is not error for the court to refuse to submit special issues to the jury, or to discharge the jury without a verdict, the court thereby practically granting a nonsuit: *Estate of Morey*, 147 Cal. 495; 82 Pac. Rep. 57, 59. In proceedings for the revocation of the probate of a will upon the ground of undue influence, where the trial court, upon motion, granted a nonsuit as against the contestants, the evidence introduced must, for the purpose of the motion, be considered as true, and must be given the greatest probative force to which, according to the law of evidence, it is fairly entitled: *In re Welch's Will*, 6 Cal. App. 44; 91 Pac. Rep. 336, 337. If the jury finds a verdict, upon insufficient evidence, on the issue of unsoundness of mind, in a contest of a will which has been admitted to probate, it is the duty of the court to set such verdict aside, and it is not error for the court, in such a case, to grant a nonsuit: *Estate of Dole*, 147 Cal. 188; 81 Pac. Rep. 534, 536, citing *Downing v. Murray*, 113 Cal. 455; 45 Pac. Rep. 869.

16. Collateral attack. The contestants of a will, cannot, in a collateral proceeding, be allowed to dispute the finding of the court, upon admitting the will to probate, as to the residence of the testator: *Estate of Dole*, 147 Cal. 188; 81 Pac. Rep. 534, 537. A proceeding instituted for the purpose of revoking the probate of a will on the ground that the court did not have jurisdiction, is collateral, where such probate had become final, except as subject to attack in the manner provided by the statute, and where the statute does not provide that want of jurisdiction is one of the grounds upon which probate may be revoked: *In re Dole's Estate*, 147 Cal. 188; 81 Pac. Rep. 534, 537.

17. Right to maintain second contest. A dismissal of the first contest of a will does not deprive the plaintiff of the right to commence and maintain a subsequent contest, based upon other grounds: *Raleigh v. District Court*, 24 Mont. 306; 61 Pac. Rep. 991, 993. Under the Kansas statute of limitation, that: "If any action be commenced within due time and a judgment thereon for the plaintiff be reversed, or if the plaintiff fail in such action otherwise than upon the merits, and the time limited for the sale shall have expired, the plaintiff, or if he die and the cause of action survive, his representatives, may commence a new action within one year after the reversal or failure"; the right to maintain a second suit to contest the probate of a will, after the expiration of two years from the probating of a will, but within one year from the dismissal of the first suit, where the first suit was voluntarily dismissed, and the second proceeding was against the same parties and for the same relief as before, is not preserved to a contestant: *Medill v. Snyder*, 71 Kan. 590; 81 Pac. Rep. 216; construing, also, the statute of wills, giving the right to

any person interested to appear and contest the validity of a will within two years after probate thereof.

18. Contest of foreign will. Under the Montana statute, although it does not provide, except by implication, as to contests of wills generally, a foreign will, after it has been admitted to probate, may be contested upon the grounds that the testator, at the time of making such will, was not of sound and disposing mind, or was acting under duress, fraud, or undue influence: *State v. District Court*, 34 Mont. 96; 85 Pac. Rep. 866, 867. A "foreign will," in the sense that the term is used in the law, is a will executed in another state by a testator residing there, admitted to probate in such sister state after the death of the testator, and subsequently offered elsewhere for probate: *State v. District Court*, 34 Mont. 96; 85 Pac. Rep. 866, 867.

19. Appeal.

(1) In general. An appeal from an order dismissing a contest was entertained by the appellate court in *Estate of Garcelon*, 104 Cal. 570, 593; 38 Pac. Rep. 414; 32 L. R. A. 595; 43 Am. St. Rep. 144. An order revoking an order refusing to admit a will to probate, is a separate and distinct matter from an order revoking letters of administration; the former is non-appealable, but the latter is appealable. Hence, if the two are combined in a single order, such order must be read distributively, and the appeal from the former will be dismissed, but the appeal from the latter will be denied: *Estate of Bouyssou*, 1 Cal. App. 657, 658; 22 Pac. Rep. 1066. Under the Montana statute, an appeal from a judgment for defendants, in proceedings against the executor and others to revoke the probate of a will, must be dismissed where not taken in time, that is, within 60 days after the entry of the judgment: *In re Reilley's Estate*, 26 Mont. 358; 67 Pac. Rep. 1121. An appeal from an order revoking the probate of a will does not revive the powers and functions of the former executor. The effect of an appeal is to stay all proceedings upon the judgment or order appealed from: *Estate of Crozier*, 65 Cal. 332, 333; 4 Pac. Rep. 109. As to effect of probate, see head-line 13, supra. The judgment of the trial court, upholding a will, will be reversed where, upon an examination of the evidence, it appears that the will was the result of imposition and undue influence practiced on the testator by the beneficiaries under it, and others acting in their interests: *Greenwood v. Cline*, 7 Or. 17, 38.

(2) Right of appeal. By an amendment of section 963 of the Code of Civil Procedure of California, passed in 1901, the right to appeal in probate matters, as prescribed in the third subdivision of that section, has been enlarged so as to include orders "refusing to revoke," the probate of a will. This amendment removes any question as to

the right of appeal from the judgment or order refusing to revoke the probate of a will, and authorities relating to a time anterior to that amendment now have no bearing upon such appeals: *Hartman v. Smith*, 140 Cal. 461; 74 Pac. Rep. 7, 9. It must be observed that, while the entry of a probate order, judgment, or decree only serves the purpose of fixing the time from which an appeal may be taken, it is the judgment, or order, or decree itself, that the statute says may be appealed from. The entry, in the book prescribed by the statute, is no part of the probate order, decree, or judgment; and the entry of such order, decree, or judgment has no relation to the question whether a new right of appeal given therefrom is retroactive. Hence if a statute is passed, giving the right of appeal from orders or judgments refusing to revoke the probate of a will, where no such appeal existed before, and the order or judgment appealed from is not entered until after the passage of the statute, such statute is not retroactive, in the absence of express direction to that effect: *Estate of Hughston*, 133 Cal. 321, 323; 65 Pac. Rep. 742, 1039.

(3) **Findings.** In an action to contest a will, joined with an action to declare a trust in property conveyed by the deceased in his lifetime to the proponent of the will, findings as to undue influence, in procuring the will and conveyances, were sustained: *Lion v. Berlou*, 57 Kan. 426; 73 Pac. Rep. 52, 54. Where the contestants of a will are, upon the issue of blood relationship and heirs, found not to be such, or any relations or heirs, and this finding is not attacked, the same is conclusive, and an appeal by such contestants, where there is no specification of any insufficiency to justify such finding, will be dismissed, upon the ground that such parties are not "aggrieved," within the meaning of the statute: *Estate of Antoldi* (Cal.), 81 Pac. Rep. 278.

(4) **Consideration on appeal.** Whether or not the trial court erred in giving a judgment of dismissal in proceedings instituted for the revocation of the probate of a document purporting to be a will, must be determined solely in the light of the facts shown by such papers, in the transcript, as may properly be held to constitute a part of the judgment roll and the settled bill of exceptions. Affidavits contained in the transcript, purporting to have been subsequently filed and used on the motion to set aside the judgment, and for a new trial, cannot be considered in the determination of such question: *Estate of Dean*, 149 Cal. 487; 87 Pac. Rep. 13, 14.

CHAPTER V.

PROBATE OF LOST OR DESTROYED WILL.

- § 1023. Proof of lost or destroyed will.
- § 1024. Form. Petition to establish lost or destroyed will.
- § 1025. Form. Petition for establishment of lost or destroyed will, and for revocation of letters of administration.
- § 1026. Form. Petition for establishment of lost or destroyed will, and for revocation of probate of prior will and letters testamentary.
- § 1027. Must have been in existence at time of death.
- § 1028. To be certified, recorded, and letters thereon granted.
- § 1029. Form. Certificate establishing lost or destroyed will.
- § 1030. Restraining order in favor of claimants.

PROBATE OF LOST OR DESTROYED WILLS.

- | | |
|---|--|
| <ul style="list-style-type: none"> 1. Pleading destruction or loss. 2. Character of evidence required. 3. Proof of execution and contents. 4. Presumptions incident to loss or destruction. | <ul style="list-style-type: none"> 5. When presumption as to revocation is overcome. 6. Burden of proof. |
|---|--|

§ 1023. **Proof of lost or destroyed will.** Whenever any will is lost or destroyed, the superior court must take proof of the execution and validity thereof and establish the same; notice to all persons interested being first given, as prescribed in regard to proofs of wills in other cases. All the testimony given must be reduced to writing, and signed by the witnesses. **Kerr's Cyc. Code Civ. Proc., § 1338.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1629.
- Colorado.** 3 Mills's Ann. Stats., secs. 4682, 4683.
- Idaho.*** Code Civ. Proc. 1901, sec. 4024.
- Kansas.** Gen. Stats. 1905, §§ 8715, 8716, 8717.
- Montana.*** Code Civ. Proc., sec. 2370.
- Nevada.** Comp. Laws, sec. 2809.
- North Dakota.** Rev. Codes 1905, § 8008.
- Oklahoma.** Rev. Stats. 1903, sec. 1514.
- South Dakota.** Probate Code 1904, § 62.
- Utah.** Rev. Stats. 1898, sec. 3809.
- Washington.** Pierce's Code, § 2402.
- Wyoming.** Rev. Stats. 1899, sec. 4594.

§ 1024. Form. Petition to establish lost or destroyed will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.] }

To the Honorable the ____² Court of the County³ of ____,
State of ____.

The petition of ____, of the county⁴ of ____, state of
____, respectfully shows:

That ____ died on or about the ____ day of ____, 19____,
at ____;

That said deceased at the time of his death was a resident
of the county⁵ of ____, state of ____, and left property in
the county⁶ of ____, in said state;

That the character of the said property and probable revenue therefrom are as follows, to wit, ____;⁷

That the estate and effects in respect to which the probate
of the will is herein applied for do not exceed in value the
sum of ____ dollars (\$____);⁸

That deceased in his lifetime made a will which, at the time
of his death, had not been revoked and was in existence; but
that said will, after the testator's death, was destroyed;⁹

That the provisions of said will can be clearly and distinctly
proved by at least two credible witnesses;

That your petitioner is an heir at law¹⁰ of said deceased,
and is interested in his estate;

That petitioner is named in said will as executor thereof,
and that he consents¹¹ to act as such executor;

(Here state the required facts as to devisees and legatees,
subscribing witnesses, next of kin, and heirs at law, competency to make a will, and validity of execution of will, as
in § 960, ante.)

Wherefore petitioner prays that this court take proof of
the execution and validity of said will and establish the same;
that the judge of this court distinctly state and certify, as
provided by law, the provisions of said will; that said will
so established be admitted to probate; that your petitioner
be appointed executor of said last will; and that letters testamentary thereon be issued to this applicant.

____, Attorney for Petitioner.¹² _____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4-6. Or, city and county. 7. State character and revenue. 8. Give separate values of real property and personal estate. 9. Or, was accidentally lost; or, was fraudulently destroyed in the lifetime of the testator by —, stating the facts. 10. Or devisee, or legatee, or other person interested in said estate, according to the fact. 11. Or, renounces his right to letters testamentary. 12. Give address.

§ 1025. Form. Petition for establishment of lost or destroyed will, and for revocation of letters of administration.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

(Make allegations the same as in § 1024, prayer excepted, and add:)

That by order of this court made on the ____ day of ____, 19____, letters of administration of said estate were issued to ____; that said ____ immediately qualified as administrator of said estate; and that he is now administering the same.

Wherefore petitioner prays that this court take proof of the execution and validity of said will and establish the same; that the judge of this court distinctly state and certify, as provided by law, the provisions of said will; that said will so established be admitted to probate; that the letters of administration on said estate, granted to ____, as aforesaid, be revoked; that your petitioner be appointed executor of said last will; and that letters testamentary thereon be issued to this applicant. _____, Petitioner.

_____, Attorney for Petitioner.

Explanatory note. 1. Give file number.

§ 1026. Form. Petition for establishment of lost or destroyed will, and for revocation of probate of prior will and letters testamentary.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____, State of ____.

The undersigned, your petitioner, respectfully alleges:

That _____ died in the county ⁴ of _____, on the _____ day of _____, 19____; that at the time of his death, he was a resident of said county ⁵ and state; that on the _____ day of _____, 19____, an order of this court was made admitting to probate a certain written instrument dated _____, 19____, purporting to be the last will of said _____, deceased; that on the _____ day of _____, 19____, said court made an order appointing _____ executor of said purported last will; that letters testamentary were issued to the said _____; that the said _____ qualified as such executor; and that he is now acting professedly as executor of the said purported last will of said _____, deceased;

That said written instrument was not the last will of said _____, deceased; that, subsequent to the making of said orders, there has been discovered the last will of decedent, which bears a later date than the one heretofore admitted to probate as aforesaid; that said last will of _____, deceased, so discovered bears date as of _____, 19____, was duly published and authenticated as required by law, and that it revokes said former will;

That said last will, bearing date as of _____, 19____, had never been revoked, and was in existence at the time of the testator's death, but was, after said time last-named, destroyed by _____; ⁶

That at the time of his death, the said _____ left estate in the county ⁷ of _____, state of _____;

(Here state character and value of property as in § 1024, ante;)

That the provisions of said last will of _____, 19____, can be clearly and distinctly proved by at least two credible witnesses;

That your petitioner is an heir at law ⁸ of said decedent, and interested in the estate left by him;

That petitioner is named in said last will of _____, 19____, as executor thereof, and that he consents to act as such executor; ⁹

(Here state the required facts as to devisees and legatees, subscribing witnesses, next of kin and heirs at law, compe-

tency to make a will, and validity of their execution of will, as in § 960, ante.)

Wherefore petitioner prays that this court take proof of the execution and validity of said last will of —, 19—, destroyed as aforesaid, and establish the same; that the judge of this court distinctly state and certify, as provided by law, the provisions of said last-named will and testament; that the written instrument heretofore admitted to probate, to wit, on the — day of —, 19—, as the last will of —, deceased, be declared not to be the last will of said —, deceased, and that the probate thereof, and the letters testamentary issued thereunder be revoked; that said will of —, 19—, as established be admitted to probate; that your petitioner be appointed executor thereof; and that letters testamentary thereon be issued to this applicant.

—, Attorney for Petitioner. —, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4, 5. Or, city and county. 6. State by whom; or, was fraudulently destroyed by —, during the testator's lifetime. See *Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts. to Codes)*, § 1339. 7. Or, city and county. 8. Or as the case may be. 9. Or renounces his right to letters testamentary, according to the fact.

§ 1027. **Must have been in existence at time of death.** No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently or by public calamity destroyed in the lifetime of the testator, without his knowledge, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses; provided, however, that if the testator be committed to any state hospital for the insane in this state and after such commitment his last will and testament be destroyed by public calamity, and the testator is never restored to competency, then after the death of the said testator, his said last will may be probated as though it were in existence at the time of the death of the testator.

Sec. 2. This act shall take effect and be in force from and

after its passage. **Kerr's Cyc. Code Civ. Proc.** (**Kerr's Stats. and Amdts.**, p. 492), § 1339.

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

- Arizona.** Rev. Stats. 1901, par. 1630.
- Colorado.** 3 Mills's Ann. Stats., sec. 4682.
- Idaho.** Code Civ. Proc. 1901, sec. 4025.
- Kansas.** Gen. Stats. 1905, §§ 8715, 8716, 8717.
- Montana.** Code Civ. Proc., sec. 2371.
- Nevada.** Comp. Laws, sec. 2810.
- North Dakota.** Rev. Codes 1905, § 8008.
- Oklahoma.** Rev. Stats. 1903, sec. 1515.
- South Dakota.** Probate Code 1904, § 63.
- Utah.** Rev. Stats. 1898, sec. 3810.
- Washington.** Pierce's Code, § 2402.
- Wyoming.** Rev. Stats. 1899, sec. 4595.

§ 1028. To be certified, recorded, and letters thereon granted. When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court, and the certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration, with the will annexed, must be issued thereon in the same manner as upon wills produced and duly proved. The testimony must be reduced to writing, signed, certified, and filed as in other cases, and shall have the same effect as evidence as provided in section one thousand three hundred and sixteen. **Kerr's Cyc. Code Civ. Proc.**, § 1340.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.*** Rev. Stats. 1901, par. 1631.
- Colorado.** 3 Mills's Ann. Stats., secs. 4682, 4683.
- Idaho.** Code Civ. Proc. 1901, sec. 4026.
- Kansas.** Gen. Stats. 1905, §§ 8718, 8719.
- Montana.*** Code Civ. Proc., sec. 2372.
- North Dakota.** Rev. Codes 1905, §§ 8008, 8012.
- Oklahoma.** Rev. Stats. 1903, sec. 1516.
- South Dakota.** Probate Code 1904, § 64.
- Utah.*** Rev. Stats. 1898, sec. 3811.
- Washington.** Pierce's Code, § 2403.
- Wyoming.** Rev. Stats. 1899, sec. 4596.

§ 1029. Form. Certificate establishing lost or destroyed will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

State of _____,
County² of _____, } ss.

I _____,³ Judge of the _____ Court of the County⁴ of _____,
State of _____, do hereby certify:

That on the _____ day of _____, 19____, there was presented in this court, by _____, a petition to establish a certain lost⁵ will as the last will of said _____, deceased; that, after due notice given, said petition came on regularly to be heard on the _____ day of _____ 19____,⁶ and, from the proofs taken therein, the court finds as follows:

That on _____, 19____, _____ died in the county⁷ of _____, state of _____; that at the time of his death he was a resident of the county⁸ of _____, state of _____; that the said decedent in his lifetime, and on or about the _____ day of _____, 19____, in the county⁹ of _____, state of _____, duly executed a will, the one alleged in said petition to have been lost,¹⁰ in the presence of _____ and _____, the subscribing witnesses thereto; that the testator acknowledged the same in their presence, and declared the same to be his last will; and that the said witnesses, at his request and in his presence, and in the presence of each other, attested the same by subscribing their names as witnesses thereto;

That said testator, at the time of executing said will, as aforesaid, was of the age of eighteen years and upwards, was of sound and disposing mind, and was not acting under restraint, undue influence, menace, or fraud, and was not, in any respect, incompetent to devise and bequeath his estate;

That said will was in existence at the time of said testator's death, and had not been annulled or revoked; but that it was lost,¹¹ after its execution and before the testator's death;

That the provisions of said alleged lost will were clearly and distinctly proved by two credible witnesses, namely, _____ and _____, whose testimony was reduced to writing,

was signed by said witnesses respectively, and filed herein; and that the provisions of said will, as shown by the testimony of said witnesses, are as follows, namely, _____.¹²

In witness whereof, I have granted this certificate under my hand and the seal of the court this ____ day of ____, 19____, and have caused the same to be attested by the clerk of this court under the seal thereof. _____, Judge.

[Seal]

Attest: Clerk of the ____ Court.

By ____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Name of judge. 4. Or, city and county. 5. Or, destroyed. 6. Or, which had been regularly continued to said time by order of the court. 7-9. Or, city and county. 10. Or, destroyed. 11. Or, accidentally destroyed; or, fraudulently destroyed, in his lifetime, by ____, fully stating, as far as possible, all facts and circumstances of fraud connected with such destruction. See *Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts. to Codes)*, § 1339. 12. Here state the provisions of the will, concerning the disposition of property, appointment of executor, and request, as for the appointment of a guardian for minor children, etc.

§ 1030. Restraining order in favor of claimants. If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator, or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors, so appointed, from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will. *Kerr's Cyc. Code Civ. Proc.*, § 1341.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1632.

Idaho.* Code Civ. Proc. 1901, sec. 4027.

Montana.* Code Civ. Proc., sec. 2373.

Nevada. Comp. Laws, sec. 2811.

North Dakota. Rev. Codes 1905, § 8008.

Oklahoma.* Rev. Stats. 1903, sec. 1517.

South Dakota.* Probate Code 1904, § 65.

Washington. Pierce's Code, § 2404.

Wyoming.* Rev. Stats. 1899, sec. 4597.

PROBATE OF LOST OR DESTROYED WILLS.

- | | |
|--|---|
| 1. Pleading destruction or loss. | 5. When presumption as to revocation is overcome. |
| 2. Character of evidence required. | 6. Burden of proof. |
| 3. Proof of execution and contents. | |
| 4. Presumptions incident to loss or destruction. | |

1. **Pleading destruction or loss.** Upon a petition to establish an instrument as a lost will, it is necessary to aver, in the petition, that such instrument was in existence at the time of the death of the testator; but this rule is sufficiently complied with, where the petitioner alleged that "said deceased, at the time of his death, left a will which your petitioner alleges to be the last will and testament of said deceased." The expression, "left a will," is equivalent to saying that the will was in existence at that time: *Harris v. Harris*, 10 Wash. 555; 39 Pac. Rep. 148. In a proceeding that alleges the fraudulent destruction of a will, the facts and circumstances constituting the fraud must be stated. Evidence showing mere neglect in preserving the will may not be sufficient to impute fraudulent conduct. If not sufficient, an order admitting the will to probate as a destroyed will, will be reversed: *Estate of Kidder*, 66 Cal. 487; 6 Pac. Rep. 326.

2. **Character of evidence required.** Lost wills are to be proved by evidence no less cogent and satisfactory than that required to establish the validity of such instruments when they are in the presence of the court, and subject to inspection and examination: *Harris v. Harris*, 10 Wash. 555; 39 Pac. Rep. 148.

REFERENCES.

Evidence to establish lost or destroyed wills: See note 38 L. R. A. 433-457.

3. **Proof of execution and contents.** Under the Washington statute, it is provided that no will is proved as a lost will unless its provisions are clearly and distinctly proved by at least two credible witnesses. The statute is mandatory, and cannot be disregarded by the courts. If there was but one witness who, according to the evidence, ever saw the will sought to be proved, the testimony is insufficient to meet the requirements of the law: *Harris v. Harris*, 10 Wash. 255; 39 Pac. Rep. 148. A copy of a lost will, proved to be correct, would not take the place of a credible witness, to satisfy the requirements of a statute providing that no will shall be allowed to be proved as a lost will unless its provisions be established by at least two credible witnesses: *Harris v. Harris*, 10 Wash. 555; 39 Pac. Rep. 148. Under the Colorado statutes, to make the proof necessary to allow the probate of a lost or destroyed will, witnesses must testify as to the contents, and the entire contents of the will, so that the instrument

can be substantially reproduced in writing, and, when so reproduced, written at length in the order admitting it to probate: *Todd v. Renich*, 13 Col. 546; 22 Pac. Rep. 898, 899. The testimony of witnesses, in an application for the probate of a lost will, is not to be disregarded merely because interested in the result. Other reasons for discrediting them must appear: *In re Miller's Will* (Or.), 90 Pac. Rep. 1002, 1003. See, also, *Hull v. Littauer*, 162 N. Y. 572; 57 N. E. Rep. 102.

REFERENCES.

Probate of lost or destroyed will: See notes *Kerr's Cal. Cyc. Code Civ. Proc.*, §§ 1338, 1339. Lost or destroyed wills including proceedings for their probate: See note 110 *Am. St. Rep.* 445-477.

4. Presumptions incident to loss or destruction. In a proceeding to establish in probate, a lost will, a legal presumption is raised that the will was destroyed by the testator with the intention of revoking it, where it was last seen in his custody, and could not be found after his death, and the burden of proof is on the proponent to overcome this presumption: *In re McCoy's Estate* (Or.), 90 Pac. Rep. 1105, 1106. The presumption, however, is but a *prima facie* one, and may be overcome by circumstances or other proof to the contrary. For this purpose, declarations of the testator are competent evidence: *In re Miller's Estate* (Or.), 90 Pac. Rep. 1002; *In re McCoy's Estate* (Or.), 90 Pac. Rep. 1105, 1106. Where it appears that a careful search was made among the papers and effects of the deceased, and neither the will nor the codicil once known to have been executed, and no other testamentary papers could be found, the presumption arises that the decedent destroyed the will and codicil with intent to revoke them. This presumption is so strong as to stand in the place of positive proof. The principle that the state of things once shown to exist will be presumed to continue, and that, therefore, the court should presume that, as in the case of a lost deed, the will remained in existence down to the death of the testator, does not apply: *In re Colbert's Estate*, 31 Mont. 461; 78 Pac. Rep. 971, 973. If a will, known to have been in the custody of the testator, cannot, after his death, be found, the legal presumption is that it was destroyed by him for the purpose of revocation. The inference is that the will destroyed or unaccounted for was executed prior to the one that was retained by the testator, and, after his death, was regularly presented for probate; and the burden lies upon the contestant to prove that the will not produced is, in fact, the last will and testament of the deceased: *In re Bell's Estate*, 13 S. D. 475; 83 N. W. Rep. 566, 567.

5. When presumption as to revocation is overcome. While the law presumes that a will proved to have been in existence, and not found

at the time of the death of the testator, was destroyed by him with intention to revoke the same, this presumption of revocation is overcome and rebutted, where it appears that the testator, after the execution of the will, deposited it with a custodian, and did not thereafter have it in his possession, or have access to it: *Harris v. Harris*, 10 Wash. 555; 39 Pac. Rep. 148.

6. Burden of proof. In case of a lost will, proof of its existence, at the time of the death of the testator, must be made by the proponent: *Estate of Johnson*, 152 Cal. 778; 93 Pac. Rep. 1015, 1017. While the burden of proving the existence of a lost will, at the time of the testator's death, rests primarily upon him who offers such a will for probate, affirmative testimony is not absolutely necessary to establish that fact, for, like other facts, it may be shown by circumstantial evidence: *Harris v. Harris*, 10 Wash. 555; 39 Pac. Rep. 148. Under the Oregon code, a will must be in writing except when made by a soldier or mariner in active service, but when in writing, secondary evidence is admissible to prove its contents. Like any other written instrument, when shown to have been lost, it may be established, on proof of such loss—the burden of which is on the proponent—and admitted to probate, unless shown to have been revoked: *In re Miller's Will* (Or.), 90 Pac. Rep. 1002, 1003.

CHAPTER VI.

PROBATE OF NUNCUPATIVE WILLS.

- § 1031. Petition must allege what.
- § 1032. Form. Petition for probate of nuncupative will.
- § 1033. Form. Opposition to probate of nuncupative will.
- § 1034. Additional requirements.
- § 1035. Contests and appointments.

PROBATE OF NUNCUPATIVE WILLS.

I. Appeal.

§ 1031. **Petition must allege what.** Nuncupative wills may at any time, within six months after the testamentary words are spoken by the decedent, be admitted to probate, on petition and notice as provided in article one, chapter two of this title. The petition, in addition to the jurisdictional facts, must allege that the testamentary words or the substance thereof were reduced to writing within thirty days after they were spoken, which writing must accompany the petition. **Kerr's Cyc. Code Civ. Proc.**, § 1344. See §§ 876-879, ante.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Arizona.** Rev. Stats. 1901, par. 1633.
- Idaho.*** Code Civ. Proc. 1901, sec. 4028.
- Montana.*** Code Civ. Proc., sec. 2380.
- North Dakota.** Rev. Codes 1905, §§ 7996, 7999.
- Oklahoma.** Rev. Stats. 1903, sec. 1518.
- South Dakota.*** Probate Code 1904, § 66.
- Utah.** Rev. Stats. 1898, sec. 3790.
- Wyoming.*** Rev. Stats. 1899, sec. 4598.

§ 1032. **Form. Petition for probate of nuncupative will.**

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____,
State of ____.

The petition of ____, of the county⁴ of ____, state of ____, respectfully shows:

That _____ died on or about the _____ day of _____, 19____, at _____; ⁵

That said deceased at the time of his death was a resident of the county ⁶ of _____, state of _____, and left property in the county ⁷ of _____, state of _____;

That the value of the estate left by said deceased does not exceed in value the sum of one thousand dollars (\$1000); ⁸

That petitioner is an heir at law ⁹ of the said _____, deceased, and is interested in his estate;

That said deceased left a last will, to wit, a nuncupative will; that testamentary words were spoken by decedent on or about the _____ day of _____, 19____; that said testamentary words ¹⁰ were reduced to writing within _____ (_____) ¹¹ days after they were spoken and on or about the _____ day of _____, 19____; that said writing is herewith presented with this petition; that more than _____ (_____) ¹² days have elapsed since the said testator's death; and that _____ (_____) ¹³ months have not elapsed since said testamentary words were spoken by the said testator;

That said will was made while the said testator was in actual military service in the field, ¹⁴ and while he was in expectation of immediate death from an injury received on the same day that said will was made, published, and declared;

That your petitioner is the person named in said will as executor thereof, and consents to act as such; ¹⁵

That the names, ages, and residences of the devisees and legatees under said will are as follows, to wit, —

Names.	Approximate ages.	Residences.
_____	_____	_____
_____	_____	_____

That the next of kin of said testator, whom your petitioner is advised and believes, and therefore alleges to be, the heirs at law of said testator, and the names, ages, and residences of said heirs, as far as known to your petitioner, are as follows, to wit, —

Names.	Approximate ages.	Residences.
_____	_____	_____
_____	_____	_____

That at the time said will was made, the said testator was over the age of eighteen (18) years, was of sound and disposing mind, and was competent to make a will; and

That the process of this court directing the widow¹⁶ of said deceased, the heirs, legatees, and other persons interested in said estate, to be called in to contest the probate of said will, if they think proper, has been duly issued and returned to this court.

Wherefore your petitioner prays that said will be admitted to probate, and that letters testamentary thereon be issued to your petitioner, the person named therein as executor as aforesaid. —, Petitioner.

—, Attorney for Petitioner.¹⁷

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, city and county. 5. State place. 6, 7. Or, city and county. 8. Or as otherwise prescribed by statute. 9. Or legatee, or devisee, or other person interested in the estate. 10. Or, the substance of said testamentary words. 11-13. As prescribed by statute. 14. Or, doing duty on shipboard at sea. Give brief statement of circumstances surrounding the testator's death. 15. Or, renounces his right to letters testamentary. 16. If any. As to execution, requisites, receiving proof, and granting probate of nuncupative wills: See §§ 876-879, ante.

§ 1033. Form. Opposition to probate of nuncupative will.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Now comes — and opposes the admission to probate of the alleged nuncupative will of the above-named decedent now presented to this court, and in support of such opposition alleges:

That he is an heir at law² of the said —, deceased, and interested in the estate left by him;

That, at the time of pronouncing said pretended will, the said —, deceased, did not bid the persons present, nor any or either of them, to bear witness that such was his will, or words to that effect;

That said pretended nuncupative will was not made while the alleged testator was in the actual military service in the field;

That no testamentary words were spoken by the said testator, and that no testamentary words ever made by him, if made at all, were reduced to writing within the time prescribed by law, or at any other time, or at all;

That said —, at the time of making said pretended will, was not in extremis;

That said — was not of sound and disposing mind at the time of pronouncing said pretended will; and

That said — at the time he is alleged to have pronounced said pretended will was under eighteen years of age.

Wherefore contestant prays that the said alleged nuncupative will be denied probate. —, Contestant.

—, Attorney for Contestant.³

Explanatory notes. 1. Give file number. 2. Or, devisee or legatee. 3. Give address. See §§ 876-879, ante.

§ 1034. Additional requirements. The superior court must not receive or entertain a petition for the probate of a nuncupative will until the lapse of ten days from the death of the testator, nor must such petition at any time be acted on until the testamentary words are, or their substance is, reduced to writing and filed with the petition, nor until the surviving husband or wife (if any), and all other persons resident in the state or county interested in the estate are notified as hereinbefore provided. **Kerr's Cyc. Code Civ. Proc., § 1345.** See §§ 876-879, ante.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1634.

Idaho. Code Civ. Proc. 1901, sec. 4029.

Montana.* Code Civ. Proc., sec. 2381.

North Dakota. Rev. Codes 1905, § 7996.

Oklahoma. Rev. Stats. 1903, sec. 1519.

South Dakota. Probate Code 1904, § 67.

Utah. Rev. Stats. 1898, sec. 3790.

Wyoming.* Rev. Stats. 1899, sec. 4599.

§ 1035. Contests and appointments. Contests of the probate of nuncupative wills and appointments of executors and administrators of the estate devised thereby must be had, conducted, and made as hereinbefore provided in cases of

the probate of written wills. **Kerr's Cyc. Code Civ. Proc., § 1346.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona.* Rev. Stats. 1901, par. 1635.
Idaho.* Code Civ. Proc. 1901, sec. 4030.
Montana.* Code Civ. Proc., sec. 2382.
North Dakota. Rev. Codes 1905, § 7996.
Oklahoma. Rev. Stats. 1903, sec. 1520.
South Dakota. Probate Code 1904, § 68.
Wyoming.* Rev. Stats. 1899, sec. 4600.

PROBATE OF NUNCUPATIVE WILLS.

Appeal.

Appeal. Upon appeal from an order dismissing a petition to contest the probate of a nuncupative will, on the ground that the contest was not instituted within one year from the date of the probate of the will, the supreme court will not pass upon the validity of the alleged will: *In re Sullivan's Estate*, 40 Wash. 202; 82 Pac. Rep. 297, 299.

PART XVII.
COMMUNITY PROPERTY AND SEPARATE
PROPERTY.

CHAPTER I.
COMMUNITY PROPERTY AND SEPARATE PROPERTY.

- § 1036. Separate property of the wife.
- § 1037. Separate property of the husband.
- § 1038. Community property. Conveyances to or by married women.
Time limit for bringing action.
- § 1039. Filing inventory is notice of wife's title, etc.
- § 1040. Earnings of wife, when living separate, are separate property.

COMMUNITY PROPERTY AND SEPARATE PROPERTY.

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|---|---|
| 1. Community prop ty. <ul style="list-style-type: none">(1) Derivation of system. Nature of wife's estate.(2) What is community property.(3) If wife dies first. Effect of.(4) If husband dies first. Effect of.(5) Succession of widow.(6) Same. Succession by children and others. | <ul style="list-style-type: none">(7) Payment of debts.(8) Distribution of. Conclusiveness.(9) Administration of. In Washington.(10) Power of husband over. 2. Separate property. <ul style="list-style-type: none">(1) Defined.(2) Distribution. |
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§ 1036. **Separate property of the wife.** All property of the wife, owned by her before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is her separate property. The wife may, without the consent of her husband, convey her separate property. **Kerr's Cyc. Civ. Code, § 162.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 13, p. 359; sec. 63, p. 367

Arizona. Rev. Stats. 1901, par. 3102.

Colorado. 2 Mills's Ann. Stats., sec. 3007.

Idaho. Civ. Code 1901, secs. 2051, 2054.

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(1729)

- Kansas.** Gen. Stats. 1905, §§ 4211, 4212.
Montana. Civ. Code, sec. 220.
Nevada. Comp. Laws, secs. 510, 518.
New Mexico.* Laws 1907, sec. 8, p. 47.
North Dakota. Rev. Codes 1905, § 4078.
Oklahoma. Rev. Stats. 1903, secs. 3142, 3143.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5234, 5244.
South Dakota. Civ. Code 1904, §§ 97, 98, 101.
Utah. Rev. Stats. 1898, sec. 1198.
Washington. Pierce's Code, §§ 3863, 3867.
Wyoming. Rev. Stats. 1899, secs. 2972, 2973.

§ 1037. **Separate property of the husband.** All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property. **Kerr's Cyc. Civ. Code, § 163.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

- Alaska.** Carter's Code, sec. 13, p. 359.
Arizona. Rev. Stats. 1901, par. 3102.
Idaho. Civ. Code 1901, sec. 2052.
Nevada. Comp. Laws, sec. 510.
New Mexico.* Laws 1907, sec. 9, p. 47.
North Dakota. Rev. Codes 1905, § 4078.
Oklahoma. Rev. Stats. 1903, sec. 3143.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5234.
South Dakota. Civ. Code 1904, §§ 97, 98.
Washington. Pierce's Code, §§ 3863, 3875.

§ 1038. **Community property. Conveyances to or by married women. Time limit for bringing action.** All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common, unless a different intention is expressed in the instrument, and the

presumption in this section mentioned is conclusive in favor of a purchaser or encumbrancer in good faith and for a valuable consideration. And in cases where married women have conveyed, or shall hereafter convey, real property which they acquired prior to May nineteenth, eighteen hundred and eighty-nine, the husbands, or their heirs or assigns, of such married women, shall be barred from commencing or maintaining any action to show that said real property was community property, or to recover said real property, as follows: As to conveyances heretofore made, from and after one year from the date of the taking effect of this act; and as to conveyances hereafter made, from and after one year from the filing for record in the recorder's office of such conveyances, respectively. **Kerr's Cyc. Civ. Code, § 164.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Arizona. Rev. Stats. 1901, par. 3104.

Idaho. Civ. Code 1901, sec. 2053.

Nevada. Comp. Laws, sec. 511.

New Mexico. Laws 1907, sec. 10, p. 47.

Washington. Pierce's Code, § 3876.

§ 1039. **Filing inventory is notice of wife's title, etc.** The filing of the inventory in the recorder's office is notice and prima facie evidence of the title of the wife. **Kerr's Cyc. Civ. Code, § 166.**

§ 1040. **Earnings of wife, when living separate, are separate property.** The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife. **Kerr's Cyc. Civ. Code, § 169.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 64, p. 367.

Arizona. Rev. Stats. 1901, par. 3103.

Montana. Civ. Proc., sec. 224.

Nevada.* Comp. Laws, sec. 523.

New Mexico.* Laws 1907, sec. 13, p. 48.

North Dakota. Rev. Codes 1905, § 4082, sub. 2.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5245.

South Dakota. Civ. Code 1904, § 102.

Utah. Rev. Stats. 1898, sec. 1201.

Washington. Pierce's Code, § 3871.

Wyoming. Rev. Stats. 1899, sec. 2976.

COMMUNITY PROPERTY AND SEPARATE PROPERTY.

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| 1. Community property. | (7) Payment of debts. |
| (1) Derivation of system. Nature of wife's estate. | (8) Distribution of. Conclusiveness. |
| (2) What is community property. | (9) Administration of. In Washington. |
| (3) If wife dies first. Effect of. | (10) Power of husband over. |
| (4) If husband dies first. Effect of. | 2. Separate property. |
| (5) Succession of widow. | (1) Defined. |
| (6) Same. Succession by children and others. | (2) Distribution. |

1. Community property.

(1) Derivation of system. Nature of wife's estate. Our purpose, in this note, is merely to give a general idea of the law governing community property and separate property. The subject, in its details, is elaborately considered in the annotations to **Kerr's Cyc. Civ. Code of California**, and we can do no better than to refer to those annotations for information concerning all matters of substantive law on this topic. The system of community estate was derived from the Mexican law, which prevailed here before the acquisition of the territories. The system was unknown to the common law, and it has no better name for the interest of the wife than "a mere expectancy": *Spreckels v. Spreckels*, 116 Cal. 339, 346; 58 Am. St. Rep. 170; 48 Pac. Rep. 228; 36 L. R. A. 497. The "estate in expectancy," of the wife in the community property, is dependent upon her survivorship: *Estate of Rowland*, 74 Cal. 523, 525; 5 Am. St. Rep. 464; 16 Pac. Rep. 315. The legal title to the community property is in the husband. He has the absolute dominion over, and control of, it, and the wife has no right or title of any kind, in any specific property, but a possible interest in whatever remains, upon a dissolution of the community otherwise than by her own death. This cannot be classified as any species of estate known to the law: *Estate of Burdick*, 112 Cal. 387, 393; 44 Pac. Rep. 734. So long as the community exists, the wife's interest therein is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity. It is like the interest which an heir may possess in the property of his ancestor: *Estate of Moffitt* (Cal.), 95 Pac. Rep. 653, 654, 1025, 1026.

(2) What is community property. All property acquired after marriage, and which was not acquired by gift, bequest, devise, or descent,

is community property: *Bollinger v. Wright*, 143 Cal. 292, 295; 76 Pac. Rep. 1108. Land paid for with community funds is community property, though the title to it was taken in the wife's name: *Dean v. Parker*, 88 Cal. 283, 287; 26 Pac. Rep. 91. If it is bought in part with the proceeds of the sale of community property, and in part with the joint note and mortgage of both husband and wife, and the deed is taken in the name of both, the property becomes community property, notwithstanding a statute which provides that, in case of a conveyance to a married woman and her husband, the presumption is that the married woman takes the part so conveyed to her as a tenant in common, unless a different intention is expressed in the instrument. Such a statute at most only creates a presumption that the deceased wife took the part conveyed to her as a tenant in common with her husband. The presumption is not conclusive, and is not intended to control or overthrow direct evidence. If the evidence overthrows the presumption, and shows that the deceased wife did not take as a tenant in common, the entire interest conveyed by the deed to husband and wife jointly is community property: *Bollinger v. Wright*, 143 Cal. 292, 295; 76 Pac. Rep. 1108.

REFERENCES.

What constitutes community property: See notes *Kerr's Cyc. Civ. Code*, § 164.

(3) **If wife dies first. Effect of.** If a wife dies, no administration at all is to be had on any but her separate property: *Estate of Young*, 123 Cal. 337, 347; 55 Pac. Rep. 1011. Upon the death of the wife, the community property belongs to the surviving husband, without administration: *Dean v. Parker*, 88 Cal. 283, 287; 26 Pac. Rep. 91; *Johnston v. San Francisco Sav. Union*, 75 Cal. 134, 142; 7 Am. St. Rep. 129; 16 Pac. Rep. 753. See *Bollinger v. Wright*, 143 Cal. 292, 297; 76 Pac. Rep. 1108; and notes *Kerr's Cyc. Civ. Code*, § 1401. The husband, upon the death of his wife, holds the community property as if his wife had never existed: *Estate of Rowland*, 74 Cal. 523, 526; 5 Am. St. Rep. 464; 16 Pac. Rep. 315.

(4) **If husband dies first. Effect of.** The husband has the sole management and control of the community property, in his lifetime, and alone can render that property chargeable with debts. Upon his death, the entire community property, as well as his separate property, is subject to the control of the court for the purposes of administration of his estate, and is taken into the possession and management of his administrator for these purposes, and, at the close of the administration, the wife receives at the hand of the court, in the same manner and at the same time as does the heir, her part of the community property,—the one half of the surplus after paying

the debts and expenses of administration: *Estate of Burdick*, 112 Cal. 387, 400; 44 Pac. Rep. 734; *Estate of Young*, 123 Cal. 337, 346; 55 Pac. Rep. 1011. In Nevada, it was held, under the statute of 1881, that, upon the death of a husband, the entire community property became his widow's property without administration, although it was subject to all the debts contracted by the husband during his lifetime, and which were not barred by the statute of limitations, if she paid all indebtedness legally due from the estate, or secured the payment of the same to the satisfaction of the creditors: *Wright v. Smith*, 19 Nev. 143; 7 Pac. Rep. 365, 366, 367.

REFERENCES.

Distribution of common property on the death of the husband: See notes *Kerr's Cyc. Civ. Code*, § 1402.

(5) **Succession of widow.** This subject has been greatly mystified by the inaccurate use of language in many of the opinions of the courts. Thus, it is said that the wife receives community property not as the "heir" of her husband, but in her own right as her half of the property which was acquired by herself and her husband during the marriage: *Estate of Burdick*, 112 Cal. 387, 400; 44 Pac. Rep. 734; and it has been reasoned that, if the "estate and expectancy" of the wife in the community property is dependent upon her survivorship; and that, in the event of her death before her husband, it is deemed never to have existed; the husband does not, on the death of his wife, as to the community property, take by descent or succession, but holds the community property as though acquired by himself, and as if his deceased wife had never existed: *Estate of Rowland*, 74 Cal. 523, 525; 5 Am. St. Rep. 464; 16 Pac. Rep. 315. But it has been determined by the supreme court of California, after mature consideration, that the interest of the surviving widow in the community property is that of an heir, and that she takes her share of the community by "succession" from the husband: *Sharp v. Loupe*, 120 Cal. 89, 93; 52 Pac. Rep. 134, 586; *William Hill Co. v. Lawler*, 116 Cal. 359, 363; 48 Pac. Rep. 323; *Estate of Burdick*, 112 Cal. 387; 44 Pac. Rep. 734; *Cunha v. Hughes*, 122 Cal. 111, 112; 68 Am. St. Rep. 27; 54 Pac. Rep. 535. It follows, that the surviving widow's title to one half of the community property is to be administered as part of the estate of her husband. As in the case of any other heir of her husband, she is not entitled to an undivided portion of each piece of property of which her husband died seised, but only to one half of the residue of his estate, which shall remain after paying the debts, family allowance, and charges and expenses of administration: *Sharp v. Loupe*, 120 Cal. 89, 93; 52 Pac. Rep. 134, 586. It also follows, that if she takes her share of community property by "succession" from the husband, that a conveyance by her of her interest in any portion of the estate, pending

administration, and before distribution, has no greater effect than would a similar conveyance by any other heir: *William Hill Co. v. Lawler*, 116 Cal. 359, 363; 48 Pac. Rep. 323. Furthermore, whatever right she may have in the estate of which her husband died seised is to be ascertained by the same means as is the right of any claimant to his estate, whether by succession or by will: *Cunha v. Hughes*, 122 Cal. 111, 112; 68 Am. St. Rep. 27; 54 Pac. Rep. 535. It seems that both husband and wife take such additional right as they acquire to the common property of the other, by inheritance. "The disposition," said Temple, J., in *Estate of Burdick* (Cal.), 40 Pac. Rep. 35, 36, "to hesitate to accept this conclusion does not arise from any ambiguity in our statutes, which I think and shall presently show, are very clear upon the subject, but from the fact that, during the existence of the community, the relation of the wife to the property, is, in some respects, quite different from that of a mere heir apparent. She has rights with reference to it which the courts will interfere to protect, and in case of a dissolution of the community by divorce, her right to one half of the property immediately attaches, subject to the power of the divorce court to deprive her of it for her delinquency. But these statutory provisions do not show that the additional right which she acquires upon the death of her husband is not as heir, and the codes seem quite clear upon the subject."

(6) *Same. Succession by children and others.* In case a married man dies leaving descendants, his widow inherits one half of the community property: *Scott v. Ward*, 13 Cal. 458; *Payne v. Payne*, 18 Cal. 291; *Jewell v. Jewell*, 28 Cal. 232; *Morrison v. Bowman*, 29 Cal. 337. The "descendants" of a person include his children, grandchildren, and their children to the remotest degree. The descendants form what is called the direct descending line. The term is opposed to that of "ascendants," and it must be observed that those who are denominated as "descendants" do not comprise all of those who come to the title by descent: *Jewell v. Jewell*, 28 Cal. 232, 236. Upon a husband's death, the community property passes to his wife and children, one half to her as survivor and one half to them, share and share alike, and they hold the property as tenants in common: *Schlarb v. Castaing* (Wash.), 97 Pac. Rep. 289, 290. Upon the death of the husband, the widow takes one half of the community property as heir, not as survivor: *Estate of Moffitt* (Cal.), 95 Pac. Rep. 653, 654; *Sharp v. Loupe*, 120 Cal. 89; 52 Pac. Rep. 134, 586; *Spreckels v. Spreckels*, 116 Cal. 339; 58 Am. St. Rep. 170; 48 Pac. Rep. 228; 36 L. R. A. 497; *Estate of Burdick*, 112 Cal. 387; 44 Pac. Rep. 734; *Estate of Angle*, 148 Cal. 102; 82 Pac. Rep. 668, 670. Upon a husband's death, one half of the community property goes to his wife and the other half to his surviving children: *Gage v. Downey*, 79 Cal. 140, 152; 21 Pac. Rep. 527, 855. One half of the community property goes absolutely to the

wife, and the remaining half to the descendants of the deceased husband — that is, to a particular class of his heirs — if not made by him the subject of testamentary disposition: *Payne v. Payne*, 18 Cal. 291, 301; *Beard v. Knox*, 5 Cal. 252; 63 Am. Dec. 125; *Estate of Gwin*, 77 Cal. 313; 19 Pac. Rep. 527. Upon the death of the father, the land, if it is community property, passes under the statute of descents, one half to the mother as her separate property, and one half to the children, adults as well as minors, subject to the right of the mother to select a homestead therefrom. But if she fails to exercise this right, the children's portion vests in them in fee at her death, subject, of course, to the costs of administration and the provable debts against the estate of the father: *Stewin v. Thrift*, 30 Wash. 36; 70 Pac. Rep. 116, 117. If a husband dies intestate, leaving no descendants, the surviving wife and surviving father of the deceased each inherit one half of the husband's half of the community property: *Jewell v. Jewell*, 28 Cal. 232, 237. In order to entitle a surviving husband or wife to the whole of the common property, it must be affirmatively shown that there are no descendants of the deceased, and no one entitled to take by descent: *Cummings v. Chevrier*, 10 Cal. 519; *Jewell v. Jewell*, 28 Cal. 232, 236. If a husband dies leaving community property, and a will, whereby he devises all of his estate to his wife for life, and after her death to be equally divided between the children, the wife is entitled to one half of the property absolutely in her own right, and to a life estate in the other half under the will: *Estate of Silvey*, 42 Cal. 210, 212. If a husband gives to his wife a legacy, and bequeaths the remainder of the community property to his daughter, his wife is entitled to half of the property, and also to the legacy taken out of the other half that was subject to the husband's testamentary disposition: *Payne v. Payne*, 18 Cal. 291, 301. The heirs of a divorced wife succeed to her interest in community property, where the decree of divorce directs an equal division of such property: *McLeran v. Benton*, 31 Cal. 29, 33.

REFERENCES.

Succession to community property: See note § 41, head-line, subd. 2, ante.

(7) **Payment of debts.** The court having control of the administration, and of the community property for that purpose, is authorized to determine what charges, debts, and expenses are to be paid out of this property, and the amount thereof: *Estate of Burdick*, 112 Cal. 387, 400; 44 Pac. Rep. 734. A testator may lawfully authorize his executor "to sell, dispose of, and convey any portion" of his estate real, personal, or mixed, at either public or private sale, and for such price or prices as he may deem best; for the purposes of paying debts against his estate; and, for this purpose, the community property is to

be deemed the property of the estate of the husband, within the meaning of such power. The husband's power to confer upon his executor an authority to sell such interest is not limited to the one half of the community property of which he had the right of testamentary disposition. The appropriation of land, by a sale, to the payment of the claims to which it is made subject, is the same whether done under an authority given by the will, or by the direction of the court. In either case, it is an act done in the administration of the estate, and, if authorized by the statute, is equally binding upon all parties interested in the estate: *Sharp v. Loupe*, 120 Cal. 89, 91, 93; 52 Pac. Rep. 134, 586.

(8) **Distribution of. Conclusiveness.** The judgment of a court having jurisdiction over the subject-matter, determining the amount of property which a surviving widow is entitled to receive at the close of the administration, is binding upon her, and may also be invoked by her as a determination of her right to the same. Whether this be called a decree of distribution, or a judgment or order fixing the amount or extent of her interest in the estate, and her right to receive the same from the administrator, is immaterial. It is the final determination of the court upon the subject within its jurisdiction, and is as binding upon her as if she had been specifically named in the statute: *Estate of Burdick*, 112 Cal. 387, 400; 44 Pac. Rep. 734; *Cunha v. Hughes*, 122 Cal. 111, 113; 68 Am. St. Rep. 27; 54 Pac. Rep. 535. A surviving widow has the privilege of electing to take in accordance with her deceased husband's will, rather than to claim her right as surviving widow to the one half of his estate, but if she fails to appear, upon application for the distribution of his estate, and to present her claim for an undivided half of the estate, her rights therein are concluded by the decree of distribution, and if not appealed from, such decree becomes conclusive: *Cunha v. Hughes*, 122 Cal. 111, 113; 68 Am. St. Rep. 27; 54 Pac. Rep. 535.

REFERENCES.

Distribution of community property upon the death of either spouse: See notes *Kerr's Cyc. Civ. Code*, §§ 1401, 1402.

(9) **Administration of. In Washington.** Under the statutes of Washington, the whole of the community property is subject, on the death of either spouse, to administration for the payment of community debts, and for distribution: *Tyan v. Ferguson*, 3 Wash. 356; 28 Pac. Rep. 910, 912; *Bank of Montreal v. Buchanan*, 32 Wash. 480; 73 Pac. Rep. 482, 483; but the administration of the separate estate of the deceased and of the community property is by one proceeding, in the sense that it is necessary for creditors to present their claims but once: *Smith v. Ferry*, 6 Wash. 285; sub nom. *In re Hill's Estate*, 33 Pac. Rep. 585, 587.

(10) **Power of husband over.** It is expressly provided by the statute that the husband shall have the management and control of the community property; but the rights of his surviving widow in the community property cannot be jeopardized by his devise in subjecting such property to the control of trustees for the use of other persons: *Estate of Burdick*, 112 Cal. 387; 40 Pac. Rep. 35, 37. Although a statute prohibits a husband from giving away community property without the consent of his wife, in writing, such statute is not retroactive, and does not deprive him of his vested right to dispose, by gift, of the community property that he had acquired prior to the enactment of such statute: *Spreckels v. Spreckels*, 116 Cal. 339, 341; 58 Am. St. Rep. 170; 48 Pac. Rep. 228; 36 L. R. A. 497. A husband can dispose by will of only one undivided half of the community property; his wife is entitled to the other half: *Beard v. Knox*, 5 Cal. 252; 63 Am. Dec. 125; *Payne v. Payne*, 18 Cal. 291, 301; *Morrison v. Bowman*, 29 Cal. 337; *Estate of Silvey*, 42 Cal. 210; *Estate of Frey*, 52 Cal. 658, 661. A purpose of attempting a disposition, by will, of property, which, by statute, would pass to the wife, as survivor of a matrimonial community, immediately upon the husband's death, is not to be readily inferred: *Estate of Silvey*, 42 Cal. 210, 213. A husband has a right to dispose of his own half of the community property, but where he attempts also to dispose, by will, of his wife's interest therein, and the proofs do not show that the wife knowingly performed any act indicating, or which could be construed to be, a waiver of her right under the will, the devise of the community property must be read as applying only to the estate within his power of testamentary disposition, namely, to his one-half: *King v. Lagrange*, 50 Cal. 328, 333. Where it was evidently the intention of a deceased husband to dispose of the entire community property as his own, to the exclusion of any claim therein of his wife, she must elect between the provisions of the will and her right as surviving spouse to one half of the community property. If she accepts the devises and bequests provided for her by the will, it confirms the disposition made by the husband of the common property: *Estate of Stewart*, 74 Cal. 98, 104; 15 Pac. Rep. 445. If a husband devises the whole of the community property, his wife is entitled to the half which goes to her by law, and, if she takes the other half as devisee under the will, she is thus possessed of the entire estate: *Payne v. Payne*, 18 Cal. 291, 302. In Washington, if a wife dies, a creditor has a right to levy on, sell, and buy the surviving husband's interest in the community real property standing in the husband's name: *Griffin v. Warburton*, 23 Wash. 231; 62 Pac. Rep. 765, 766.

REFERENCES.

Management, control, and disposition of community property: See notes *Kerr's Cyc. Civ. Code*, § 172. Liability of community property for debts before estate descends to heirs: See note 19 L. R. A. 234.

That heirs or personal representatives may sue for the death of one, not a minor, caused by the wrongful act of another: See **Kerr's Cyc. Code Civ. Proc.**, § 377; but the husband's right of action for an injury to his wife, resulting in death, is not community property, when: See *Redfield v. Oakland Con. St. Ry. Co.*, 110 Cal. 277, 289, 290; 42 Pac. Rep. 822. In a jurisdiction where an estate by entireties may be taken, the wife, after her husband's death, becomes the sole owner of real property conveyed by deed to him and her during coverture: See *McLaughlin v. Rice*, 185 Mass. 212; 102 Am. St. Rep. 339; 70 N. E. Rep. 52; but as to the effect of a deed to husband and wife, where the community property system prevails, see notes **Kerr's Cyc. Civ. Code**, § 164, pars. 36-75.

2. Separate property.

(1) **Defined.** The statute defines what is the separate estate of the husband, and what is the separate estate of the wife. As to when a separate purchase of land by a surviving spouse from the government is the separate property of the survivor, see *Carratt v. Carratt*, 32 Wash. 517; 73 Pac. Rep. 481. In Colorado, the surviving husband inherits half of his wife's estate subject to her debts: *Nichols v. Lee*, 16 Col. 147; 26 Pac. Rep. 157. Property acquired by the wife after marriage "by gift, bequest, devise, or descent," is her separate property: *Bell v. Wyman*, 147 Cal. 514; 82 Pac. Rep. 39. "All property, real and personal, owned by either husband or wife, before marriage, and that acquired by either of them afterwards by gift, devise, or descent, shall be their separate property": Cal. Const. of 1879, Art. XX, § 8. The old constitution of the state contained a similar provision. "All property which can be shown to belong to the separate estate of the wife, by satisfactory testimony, whether the same be real, personal, or mixed, and all the rents, issues, profits, and increase thereof, whether the same be the fruit of trade and commerce, of loans and investments, or the spontaneous production of the soil, or wrested from it by the hand of industry, is, under the constitution, sacred to the use and enjoyment of the wife. The manifest object of the framers of the constitution was to protect the wife, as well during the lifetime of the husband, as after his death, should she survive him, against the consequences of his improvidence or misfortune, by securing to her, separate and apart from him, such property as she may hold in her own right at the time of marriage, and such as she may afterwards acquire by gift, devise, or descent. The constitution, therefore, to that end, departs widely from the rules of the common law, and, in effect, provides that the relation of the wife to her property, so far as title, use, and enjoyment are concerned, shall not be prejudiced by the fact of coverture, and that no legal or beneficial interest therein shall thereby pass or vest in the husband. In this respect, it does away with the common law results of marriage, and

preserves and continues in the wife the rights of a feme sole, and thus presents to her, already drafted and engrossed, a marriage settlement which is more solemn than private compacts, and is beyond the reach of legislative interference. Nor can the rights thus secured be frittered away by a judicial construction which can assign no better reason than a lingering fondness for the harsh ideas of the common law": *Lewis v. Johns*, 24 Cal. 98, 103; 85 Am. Dec. 49, per Sanderson, C. J.

REFERENCES.

Separate property of the wife and of the husband: See notes *Kerr's Cyc. Civ. Code*, §§ 162, 163. Does conveyance by husband to wife create separate estate? See note 69 L. R. A. 370-374. Liability of separate estate of wife for her funeral expenses: See note 6 L. R. A. (N. S.), 917.

(2) **Distribution.** When the separate property of either spouse is intermixed or commingled with community property, so that the separate property has lost its identity, and cannot be clearly traced or segregated, the community, being the paramount estate, draws the whole mass to it, and it becomes community property. 'The general rule laid down by the courts is, that such confusion works a forfeiture of the separate character of the property so commingled. But where the community interest is inconsiderable in the property with which it has been intermingled, the community will not draw it to the separate estate': *Estate of Cudworth*, 133 Cal. 462, 467; 65 Pac. Rep. 1041, quoting from *Ballinger on Community Property*. And where the separate property of a husband can be traced, the original capital and its transmutations, when it passes into his estate, are still separate property equally with the rents, income, and profits derived therefrom. But if there has been a great shrinkage in the husband's personal property, at the time of his death, as compared with what would naturally be derived from his income, the court should not decree that the personal property of the estate of said decedent is community property, but should decree that it is his separate property, and that it be distributed accordingly: *Estate of Cudworth*, 133 Cal. 462, 468, 469; 65 Pac. Rep. 1041.

PART XVIII.
ESTATES OF MISSING PERSONS.

CHAPTER I.
ESTATES OF MISSING PERSONS.

- § 1041. Trustees for. Appointment of, by court.
- § 1042. Bond to be given by trustee.
- § 1043. Powers and duties of trustee.

ESTATES OF MISSING PERSONS.
Invalidity of statute.

§ 1041. Trustees for. Appointment of, by court. Whenever any resident of this state, who owns or is entitled to the possession of any real or personal property situate therein, is missing, or his whereabouts unknown, for ninety days, and a verified petition is presented to the superior court of the county of which he is a resident by his wife or any of his family or friends, representing that his whereabouts has been, for such time, and still is, unknown, and that his estate requires attention, supervision, and care of ownership, the court must order such petition to be filed, and appoint a day for its hearing, not less than ten days from the date of the order. The clerk of the court must thereupon publish, for at least ten days prior to the day so appointed, a notice in some newspaper published in the county, stating that such petition will be heard at the court-room of the court at the time appointed for the hearing. The court may direct further notice of the application to be given in such manner and to such persons as it may deem proper. At the time so fixed for such hearing, or at any subsequent time to which the hearing may be postponed, the court must hear the petition and the evidence offered in support of or in opposition

thereto, and, if satisfied that the allegations thereof are true, and that such person remains missing, and his whereabouts unknown, must appoint some suitable person to take charge and possession of such estate, and manage and control it under the direction of the court. In appointing a trustee, the court must prefer the wife of the missing person (if any such there is), or her nominee, and, in the absence of a wife, some person, if such there is who is willing to act, entitled to participate in the distribution of the missing person's estate were he dead. **Kerr's Cyc. Code Civ. Proc.** § 1822. See **Kerr's Stats. and Amdts. to Codes**, p. 510.

§ 1042. **Bond to be given by trustee.** Every person appointed under the provisions of the preceding section must give bond in the amount and as provided for in section thirteen hundred and eighty-eight. **Kerr's Cyc. Code Civ. Proc.**, § 1822a. See **Kerr's Stats. and Amdts. to Codes**, p. 511.

§ 1043. **Powers and duties of trustee.** The trustee must take possession of the real and personal estate in this state of such missing person, and collect and receive the rents, income, and proceeds thereof, collect all indebtedness owing to him, and pay the expenses thereof out of the trust funds, and pay such indebtedness of the missing person as may be authorized by the court. The court may direct the trustee to pay to the person or persons constituting the family of the missing person such sum or sums of money for family expenses and support from the income of the estate as it may, from time to time, determine. The trustee must, from time to time, when directed by the court, account to and with it for all his acts as trustee, and the court may, at any time, upon good cause shown, remove any trustee, and appoint another in his place. **Kerr's Cyc. Code Civ. Proc.**, § 1822b. See **Kerr's Stats. and Amdts. to Codes**, p. 511.

Note.—Constitutionality of statutes providing for administration of estate of absentee: See note 4 L. R. A. (N. S.) 944, 945.

ESTATES OF MISSING PERSONS.**Invalidity of statute.**

Invalidity of statute. The statute of North Dakota, providing for the appointment of a special administrator in cases where "the death of the person whose estate is in question is not satisfactorily proved, but he is shown to have disappeared under circumstances which afford reasonable grounds to believe either that he is dead or has been secreted, confined, or otherwise unlawfully done away with," is invalid, as depriving the person of his property and its possession without notice or due process of law, when applied to the property of a person living: *Chapp v. Hong*, 12 N. D. 600; 98 N. W. Rep. 710. In this case, the trial court found that the order of the county court, appointing a special administrator of Hong's estate was null and void, for the reason that said Hong was not dead, but a living person, and denied the administrator's application for costs and necessary disbursements and expenses incurred while acting as such special administrator. The administrator appealed from a judgment entered on such finding. He contended that the statute, under which the appointment was made, did not contemplate a general administration of the estate, but simply the taking of possession of the estate of the absentee until his return, or until satisfactory proof of his death was received, and a general administrator appointed. The appellate court did not determine whether the statute was applicable to the estates of dead, or of living, persons, or both, nor whether the statute was unconstitutional, as conferring powers on the probate court, in respect to preserving the property of absentees, not vested in it by the constitution. But it did reach the conclusion that the law, so far as it affected the property of living persons, contravened the provision of the fourteenth amendment of the Federal constitution. "The absence of notice," said Morgan, J., in rendering the opinion of the court, "renders the proceedings void, and the statute is of no validity, as against the property of a living person, because it does not provide for notice to him. In no case, under state procedure, is the mere taking of possession of property equivalent to notice of action to be taken in reference to such property." The taking of the possession of the property of such person, under letters of administration issued without notice, is not such notice to the owner as will validate the proceedings; and all costs, incurred by such administrator, and disbursements made by him, though acting in good faith, are not a legal charge against such person or his property, as the proceedings are wholly void: *Chapp v. Hong*, 12 N. D. 600; 98 N. W. Rep. 710, 712. The statute of Rhode Island at one time provided, that "if any person shall be absent from this state for the term of three years, without proof of his being alive, administration may be granted upon such person's estate as if he were dead." Letters of administration on an absentee's estate were granted, under this statute, after he had been absent about ten years.

The letters, on their face, did not purport to be letters of administration on the estate of a deceased person. The statute did not require anything further to be shown than that the absentee had left the state and remained away for three years. The absentee had deposited money with a bank, and, after the letters of administration were issued, the bank paid the money over to the administrator appointed. The absentee afterwards appeared and demanded the amount of his deposit from the bank. This demand was met by a reply that the bank had paid the money to the administrator. The depositor then sued the bank to recover the money. It was held that the effect of such administration was to deprive the plaintiff of his property without due process of law. The doctrine of equitable estoppel, it was said, could not be applied to such a case, because all persons dealing with a person holding letters of administration, in a case like this, must be held to know that the proof of death rests wholly on evidence not inconsistent with the fact of life, and that therefore, if the person is alive, the judgment of the probate court that he is dead cannot be conclusive against him. There is, it seems, no element of an estoppel in pais, in such a case, because there is no deception or false representation of any fact. The party deals with the matter knowing that the supposed decedent may be alive. He knows that he takes or deals with his property subject to that risk. The state may make a law for taking care of abandoned estates, with proper provisions for notice to absent or unknown heirs, and it is within the power of the state to provide all proper safeguards for the protection of innocent persons who have been led into mistake, to their injury, by the action of the probate court, or otherwise; but this laudable and proper legislation ought to stop where it will operate to deprive another innocent person of his property for their benefit. "There are some misfortunes that even the most innocent cannot be protected against by the power of the state. Such is the case of persons who are innocently misled into the belief that void judgments are valid, as in the case of a suit the belief that void judgments are valid, as in the case of a suit carried on against a person supposed to be alive, but in reality dead": *Lavin v. Emigrant Ind. Sav. Bank*, 1 Fed. Rep. 641, 642, 675, per Choate, J.

REFERENCES.

References. For various state statutes relative to the administration of the estates of absent persons: See 1 Woerner's American Law of Administration, § 212.

PART XIX.

COLLATERAL-INHERITANCE TAXES.

CHAPTER I.

COLLATERAL-INHERITANCE TAXES.

- § 1044. Form. Petition for appointment of appraiser where value of property subject to tax is uncertain.
- § 1045. Form. Inheritance tax petition. (Colorado.)
- § 1046. Form. Order appointing appraiser of property subject to.
- § 1047. Form. Order appointing appraiser. (Colorado.)
- § 1048. Form. Warrant to appraiser. (Colorado.)
- § 1049. Form. Notice of time and place of appraisement.
- § 1050. Form. Report of appraiser of tax. (Colorado.)
- § 1051. Form. Order approving report of appraiser and fixing amount of tax. (Colorado.)
- § 1052. Form. Order fixing tax.
- § 1053. Form. Notice to county treasurer of intended delivery of securities subject to tax.
- § 1054. Form. Treasurer's notice to district attorney that tax is unpaid.
- § 1055. Form. Petition for citation to show cause why tax should not be paid.
- § 1056. Form. Order that citation issue to show cause why tax should not be paid.
- § 1057. Form. Citation to show cause why tax should not be paid.
- § 1058. Form. Bond of beneficiary to state.
- § 1059. Form. Bond of executor or administrator.
- § 1060. Form. Table of exemptions and percentages.

COLLATERAL-INHERITANCE TAXES.

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| <ul style="list-style-type: none"> 1. Right to impose. 2. Constitutionality of acts. <ul style="list-style-type: none"> (1) In general. (2) Due process of law. (3) Uniformity of taxation. (4) Exemptions. (5) Same. Discrimination. (6) Conformity of body of act with its title. | <ul style="list-style-type: none"> (7) Revision of act, or amendment of section. 3. Construction of acts. <ul style="list-style-type: none"> (1) In general. (2) Inheritance and taxes. Distinction. (3) Right of state. (4) Collateral-inheritance tax. Liability for. |
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| (5) Same. When payable, with interest. | (1) Practice. Collection. Commission. |
| (6) Same. Computation of primary rates. Exemption. | (2) Payment of tax should appear in final account. |
| 4. Conclusiveness of judgment. | (8) Power and duty of state controller. |
| 5. Practice. Collection. State controller. | 6. Appeal. |

§ 1044. Form. Petition for appointment of appraiser where value of property subject to tax is uncertain.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable the ____² Court of the County³ of ____, State of ____.

The undersigned, your petitioner, respectfully represents, That said ____ died testate in the state of ____, on or about the ____ day of ____, 19____; and that he was, at the time of his death, a resident of the county⁴ of ____, in said state;

That on the ____ day of ____, 19____, the ____⁵ court of said county⁶ of ____, state of ____, appointed ____ as executor of the last will of said deceased; that the said ____ qualified as such executor; that letters testamentary were issued to him; and that he is now the duly qualified and acting executor of said estate;

That said decedent died possessed of certain property which is or may be subject to the payment of a tax imposed by law in relation to gifts, legacies, inheritances, bequests, devises, successions, and transfers; and that said property is particularly described as follows, to wit, ____;

That the value of said property which is or may be subject to said tax as aforesaid is uncertain; and that before said tax can be collected, it will be necessary to ascertain the value of said property; and

That your petitioner is a taxpayer⁷ in the said county⁸ of ____, and as such is interested in having said tax paid.

Wherefore petitioner asks for an order appointing an appraiser to ascertain and report to this court the value of said property of said estate hereinbefore described.

____, Attorney for Petitioner.

____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, city and county. 5. Title of court. 6. Or, city and county. 7. Or, according to the fact. 8. Or, city and county. See *Henning's General Laws* (Cal.), p. 143, § 14.

§ 1045. Form. Inheritance tax petition. (Colorado.)

[Title of court.]

[Title of matter.]

[Title of form.]

State of Colorado, }
County ¹ of ____ } ss.

To the Honorable ____, Judge of the County Court of the County ² of ____, Colorado:

The petition of ____ respectfully shows:

First. That your petitioner is the ____³ of deceased, and, as such, a person interested in the estate of the said deceased.

Second. That the said decedent departed this life on the ____ day of ____, at ____; that the said decedent was a resident of ____.

Third. That letters ____⁴ on the estate of said deceased were, on the ____ day of ____, issued to your petitioner by the county court of the county ⁵ of ____, Colorado, and that his post-office address is ____.

Fourth. That, as your petitioner is informed and believes, the property of said decedent, or some portion thereof or some interest therein is, or may be, subject to the payment of the tax imposed by the law in relation to public revenue.

Fifth. That all persons who are interested in said estate and who are entitled to notice of all proceedings therein, and their post-office addresses, are as follows:

Names.	Residences.	Relationship.	Interest.	Valuation.
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Also give the names of the treasurer and the attorney-general of the state of Colorado, with their addresses.

That all the above-named are of full age and sound mind, except: ____⁶.

Wherefore you petitioner prays that you will designate an appraiser, as provided by law.

Dated ____, 19__.

____, Petitioner.

State of Colorado, }
 County ⁷ of _____, } ss.

_____, being duly sworn, deposes and says, That he is the petitioner herein; that he has read the foregoing petition subscribed by him and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

_____, Petitioner.

Subscribed and sworn to before me this _____ day of _____, 19—.

_____, Clerk of the County Court.

By _____, Deputy.

Explanatory notes. 1, 2. Or, City and County. 3. State relationship. 4. Testamentary, or, according to the fact. 5. Or, city and county. 6. State the facts. 7. Or, City and County. See 3 Mills' Ann. Stats. (Col.), § 3822.

§ 1046. Form. Order appointing appraiser of property subject to.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
 { [Title of form.]

It appearing to the court that the value of certain interests in the estate of said deceased, subject to collateral-inheritance tax, are uncertain, —

It is hereby ordered by the court, That _____, a competent person be, and he is hereby, appointed appraiser herein to appraise all inheritances or interests herein subject to collateral-inheritance tax; ² that he give notice of the time and place at which he will appraise said property to all persons known to have or to claim an interest therein,³ also to _____,⁴ by written notice mailed at least _____⁵ days prior thereto; and that he report such appraisement to this court in writing, stating separately the value of the interest of each person interested in said estate, together with any other facts, in relation to said matter, which may come to his knowledge, and which may tend to assist the court in assessing and fixing the market value of any interest in said estate subject to said tax.

_____, Judge of the _____ Court.

Dated _____, 19—.

Explanatory notes. 1. Give file number. 2. Or, to appraise the value of the shares of — and —, in the property of said deceased; or, to appraise property devised by the will of said deceased to — and —. 3. Or, to the said persons named. 4. As directed by the court. 5. As ordered by the court. See *Henning's General Laws* (Cal.), p. 143, § 14.

§ 1047. Form. Order appointing appraiser. (Colorado.)

[Title of court.]

[Title of estate.]

[Title of form.]

Upon the application of —, it is ordered, That —, of the county ² of —, state of Colorado, be, and he is hereby, appointed appraiser, to appraise and fix the fair market value of the property of which —, late of the county ³ of —, state of —, died seised and possessed, subject to taxation, under and pursuant to chapter 3 of the revenue law of 1902, and any laws amendatory thereof or supplementary thereto.

It is further ordered, That said appraiser give notice, as required by law, to all persons known to have a claim to, or interest in, said property, and —, attorney-general of the state of Colorado, and —, treasurer of said state, of the time and place when he will appraise and fix the fair market value of such property.

And it is further ordered, That said appraiser make a report thereof and of such value, in writing, and of his proceedings under this order, to the Honorable —, judge of the county court of —, Colorado, and to the attorney-general and state auditor, together with the depositions of the witnesses examined, and such other facts in relation thereto, and to the said matter, as said judge may order or require.

And it is further ordered, That when a will is filed, a copy of the same shall be forwarded to the attorney-general and the state auditor, and in case the property passes by intestacy, the appraiser shall report whether there is any property, real or personal, outside of the state, the approximate value, location, and description of the same, and whether it has been sold, and at what price; and also whether

the same has been probated under the laws of a foreign state. _____, Judge of the County Court.

Explanatory notes. 1. Or, City and County. 2, 3. Or, city and county. See 3 Mills's Ann. Stats. (Col.), § 3822.

§ 1048. Form. Warrant to appraiser.¹ (Colorado.)

State of Colorado, }
City and County of Denver. } ss.

County Court in Probate, _____ Term, _____, 19____.

The People of the State of Colorado, to _____, of the City and County of Denver, State of Colorado, Greeting:

This is to authorize you to appraise the goods and chattels, personal and real estate, of _____, late of the city and county of Denver, state of Colorado, deceased, so far as the same shall come to your sight and knowledge, you having first taken the oath of appraiser.

Witness, _____, clerk of said county court, at his office in Denver, and the seal of said court, this _____ day of _____, 19____.

[Seal]

_____, Clerk of the County Court.
By _____, Deputy.

Explanatory note. 1. See 3 Mills' Ann. Stats. (Col.), § 3822.

§ 1049. Form. Notice of time and place of appraisement.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

To _____, _____, and _____.²

You are hereby notified, That on the _____ day of _____, 19____, I, the undersigned, was, by order of the above-entitled court, appointed an appraiser to appraise all inheritances or interests in the above-entitled estate subject to collateral-inheritance tax under the laws of this state; and that, in pursuance of law, I will, on the _____ day of _____, 19____, at the hour of _____ o'clock in the forenoon³ of said day, at _____, in the county⁴ of _____, state of _____, proceed to appraise all of the property of said estate subject to said tax.

Dated _____, 19____.

_____, Appraiser.

Explanatory notes. 1. Give file number. 2. To be given, by mail, to all persons known to have or to claim an interest in the property. 3. Or, afternoon. 4. Or, city and county. See **Henning's General Laws** (Cal.), p. 143, § 14.

§ 1050. Form. Report of appraiser of tax. (Colorado.)

[Title of court.]

[Title of matter.]

[Title of form.]

{ Decedent died _____, 19____, a legal resident
of the County of _____, State of Colorado.

State of Colorado, }
County ¹ of _____, } ss.

To the Honorable _____, Judge of the County Court of the
County ² of _____, State of Colorado.

I, the undersigned, appraiser, who was, by an order of the
county court of the county ⁴ of _____, state of Colorado, duly
made and entered on the _____ day of _____, 19____, directed
to appraise the property of said decedent, at its fair market
value at the time of the death of decedent, in pursuance of
the laws in relation to public revenue, do respectfully report:

First. That, pursuant to chapter 3 of the laws of 1902, I
duly took and subscribed the oath prescribed by statute, and
filed the same as therein provided.

Second. That, on the _____ day of _____, 19____, I gave
notice as follows, by mail, postage prepaid, to such persons,
corporations, etc., known to have, or to claim, an interest in
any property of said decedent subject to the payment of any
tax imposed by said laws, including the attorney-general and
treasurer of the state of Colorado, state auditor, and those
persons or corporations named by the said county court in its
order, of the time and place at which I would appraise said
property; and that a true copy of said notice, together with
proof of mailing, is hereto annexed. Said notice, as afore-
said, was given to _____, residing at _____, stating relation-
ship and nature of interest; _____, residing at _____, stating
relationship and nature of interest; _____, executor of said
estate, residing at _____; attorney-general, _____, residing at
_____; state treasurer, _____, residing at _____; and state
auditor, _____, residing at _____.

Third. At the time and place in said notice stated, namely, on the ____ day of ____, 19__, at ____ (and at other subsequent times and divers places to which these proceedings were regularly adjourned), I appraised all the property, real, personal, and mixed, of which the said decedent died possessed, at its fair market value at the time of the death of decedent, as follows, to wit:

Notes, Stocks, Bonds, and Accounts.

Give each item, stating the kind or by whom
owing, the date, principal or amount, interest
(rate and amount), whether good, doubtful,
or desperate, and the value.....\$____
Total value\$____
Other personal property, giving description and
valuation
Total value\$____

Real Estate.

Description of each parcel of land, including
acres, nature or kind, section, township,
range, and county, with value of land and
improvements\$____
Water rights belonging thereto, with shares
in companies, if any, and value.....
Additions and subdivisions, giving lot, block,
town, or city and county, with value.....
Total value\$____

Fourth. I further report that decedent's estate is subject to the following deductions on account of debts, claims, expenses of administration, and commissions, as follows, to wit, —

Deductions on Account of Debts, etc.

Debt or claim of ____, nature of same, and
amount\$____
Debt or claim of ____, nature of same, and
amount
Total amount\$____

Fifth. Recapitulation.

Total amount of decedent's real estate.....\$——
 Total amount of decedent's personal estate.... ——
 Total\$——
 From which debts, expenses of administration,
 as enumerated in the "Fourth" finding
 above are to be deducted, amounting to.....\$——
 Leaving the sum of\$——
 which is the net estate transferred by the tes-
 tator's will (or the intestate laws of the
 state) as follows: —
 Names and residences of the persons, corpora-
 tions, or institutions receiving any property,
 giving relation to decedent, nature of interest
 (whether absolute or otherwise), and stating
 whether the same is real or personal prop-
 erty, with value of property or interest trans-
 ferred\$——
 Total amount of property transferred.....\$——

Sixth. I further report that all of said persons interested
 in said estate are of sound mind, and of full age except ——.

Seventh. I further report that the following appearances
 were made before me in this proceeding: ——.

Eighth. I further report as follows: Name of decedent
 ——, Date of decedent's death ——, That the six-months'
 limitation from said date of death expires on the —— day
 of ——, 19——, Decedent was a resident of the town of
 ——, county of ——, state of ——, Decedent left ——⁶
 will. Letters ——⁶ were duly issued on the —— day of
 ——, 19——, by the county court of the county of ——,
 state of Colorado, upon the estate of said deceased, ——, to
 ——, whose post-office address is ——.

Ninth. I further report that filed herewith is all the tes-
 timony taken by me, and the copies of all papers presented
 to me in this proceeding, namely: ——.⁷

Tenth. I do further report, that the said deceased did
 ——⁸ make ——⁹ transfer —— of¹⁰ property by deed,
 grant, bargain and sale, or gift in contemplation of death, or

intended to take effect in possession or enjoyment at or after death of said deceased.

Eleventh. I further report that the following witnesses were subpoenaed before me; that the address, attendance, and miles necessarily traveled, one way, are as follows, to wit:

[Name of witness, with address, days in attendance, and mileage.]

Twelfth. I do further report that I was actually and necessarily employed _____¹¹ days in the matter of said appraisement, and that my actual and necessary traveling expenses were _____ dollars (\$_____).

Thirteenth. I do further report that the following personal property, outside of the state of Colorado, belongs to the estate of the deceased:

Personal Property Outside of State.

Notes, stocks, bonds, accounts, and other personalty, giving description, location and value. . . . \$_____

Fourteenth. I do further report _____.¹²

All of which is respectfully submitted this _____ day of _____, 19____. _____, Appraiser.¹³

Explanatory notes. 1-3. Or, City and County. 4. Or, city and county. 5. State whether decedent left a will or not. 6. Testamentary, or, according to the fact. 7. Testimony need not be filed unless ordered by the court. 8. Or, did not. 9. A, or any, as the case may be. 10. His or her. 11. State number of days. 12. State any further facts reported by the appraiser. 13. This report is to be filed and recorded. See 3 Mills' Ann. Stats. (Col.), § 3822.

§ 1051. Form. Order approving report of appraiser and fixing amount of tax. (Colorado.)

[Title of court.]

[Title of estate.]

[Title of form.]

Date of decedent's death, _____.

On the report of the appraiser duly appointed to fix the fair market value of the real estate and personal property of which _____, late of _____, died seised and possessed, subject to taxation under chapter 3 of the laws of 1902, and any act supplemental thereto or amendatory thereof.

It is determined,¹ on this ____ day of ____, 19____, That the cash value of said property be, and the same is hereby, fixed, and the amount of the tax to which the same is liable, as follows:

Names of persons or corporations to whom
property is transferred, giving relationship,
if any, with a general description of the
property, its cash value, amount of tax, and
amount of interest\$____
Total\$____
_____, Judge.

Explanatory note. 1. This order should be accompanied by the following notice, namely: To all parties interested in the determination of fixing the value of taxable property and the amount of the tax. Unless otherwise herein expressed, this tax becomes due and payable to the treasurer of the city and county of Denver, upon the death of the decedent. If paid within six (6) months, a discount of five (5) per centum will be allowed. If not paid within six (6) months, interest will be charged at the rate of six (6) per centum from the death of decedent. See 3 Mills' Ann. Stats. (Col.), § 3822.

§ 1052. Form. Order fixing tax.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
[Title of form.]

Upon the report of the appraiser herein appointed, it is ordered by the court, That the market value of the property of said estate to be received on distribution and the tax to be paid thereon by the following-named persons respectively, is as follows, to wit: ____; ² value, ____ dollars (\$____); ³ tax due, ____ dollars (\$____),⁴ etc.; and that the appraiser of said estate forthwith give notice of the substance of this order to each of said persons, by written notice sent by mail to the respective address of each person whose address is known to him or to the attorneys of such as have appeared herein.

Done in open court this ____ day of ____, 19____.
_____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2-4. Give name of each person separately, with value of each one's interest, and tax due from each. See *Henning's General Laws* (Cal.), p. 143, § 14.

§ 1053. Form. Notice to county treasurer of intended delivery of securities subject to tax.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

You are hereby notified, That _____, foreign executor of the will of _____, deceased, has assigned to _____ the following stock, obligations, and securities, of the value of _____ dollars (\$_____), now in possession of the undersigned safe deposit and trust company, a corporation, which said securities, etc., stand in the name of said decedent,² and which, having been bequeathed to beneficiaries under said will, are subject to a collateral-inheritance tax of _____ dollars (\$_____); said stock, obligations, and securities being described as follows, to wit: _____.

And you are further notified, That said company will, on the _____ day of _____, 19____, at _____,³ make delivery and transfer of the same to said _____, as requested.

_____, Company.

By _____, Secretary.

Explanatory notes. 1. Give file number. 2. Or, are held in trust for him. 3. State place. See *Henning's General Laws* (Cal.), p. 142, § 13.

§ 1054. Form. Treasurer's notice to district attorney that tax is unpaid.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To _____, _____² Attorney of the County³ of _____, State of _____.

You are hereby notified, That _____, who is a legatee under the will of said _____, deceased, and whose interest in the property of said estate is subject to a collateral-inheritance tax under the laws of this state, has neglected to pay said tax; and that I have reason to believe that said tax is now due and unpaid.

_____, Treasurer of the County⁴ of _____, State of _____.

Explanatory notes. 1. Give file number. 2. District, or as the case may be. 3. Or, City and County. 4. Or, city and county. See *Henning's General Laws* (Cal.), p. 144, § 18.

§ 1055. Form. Petition for citation to show cause why tax should not be paid.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

To the Honorable ____, Judge of the ____² Court of the County³ of ____, State of ____.

The undersigned, your petitioner, respectfully represents that said ____ died in the state of ____, on or about the ____ day of ____, 19__; and that he was, at the time of his death, a resident of the county⁴ of ____, in said state;

That on the ____ day of ____, 19__, the ____⁵ court of said county⁶ of ____, state of ____, appointed ____ as executor of the last will of said deceased; that the said ____ qualified as such executor; that letters testamentary were issued to him; and that he is now the duly qualified and acting executor of said estate;

That said deceased died possessed of certain property within this state, a portion of which has been distributed to ____, a non-resident of this state, which portion exceeds in value the sum of five hundred dollars (\$____),⁷ which portion is not exempt from the tax imposed by law upon gifts, legacies, inheritances, bequests, devises, successions, and transfers, but which portion is subject to taxation under said law, and which portion is particularly described as follows, to wit: ____.⁸

That your petitioner is the duly elected, qualified, and acting ____⁹ attorney for the said county¹⁰ of ____, state of ____,¹¹ and has been notified in writing by ____, the treasurer of said county,¹² that the said distributee, whose duty it is to pay said tax and who is liable therefor, has failed, neglected, and refused to pay the same, and that your petitioner has probable cause to believe that said tax is now due and unpaid.

Wherefore petitioner prays that a citation issue to the said ____, requiring him to appear before this court on a day certain and show cause why said tax should not be paid.
____, Petitioner.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Or, City and County. 4. Or, city and county. 5. Title of court. 6. Or city and county. 7. Or, as fixed by statute. 8. Give description. 9. District, or according to the fact. 10. Or, city and county. 11. Or, that your petitioner is an attorney at law, fully admitted to practice in all the courts of the state of ____; and that on the ____ day of ____, 19__, the county treasurer of the county of ____, in said state, appointed your petitioner a special attorney to prosecute proceedings against persons interested in property liable to said tax under said law. 12. Or, city and county. See **Henning's General Laws** (Cal.), pp. 144, 145, §§ 17, 18, 23.

§ 1056. Form. Order that citation issue to show cause why tax should not be paid.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

It having been shown to this court that there is certain property belonging to the above-entitled estate, subject to a collateral-inheritance tax imposed by the laws of this state, which tax is now due and unpaid, —

It is ordered, That a citation issue to ____² to appear before the court on ____,³ the ____ day of ____, 19__, at ____ o'clock in the forenoon⁴ of said day, in the court-room of Department No. ____, of said court, and show cause why the said tax should not be paid.

Dated ____, 19__. ____, Judge of the ____ Court.

Explanatory notes. 1. Give file number. 2. The executor of the will, or to persons known to own any interest in, or part of the property liable to the tax, or to any person or corporation liable, under the law, for the payment of said tax. 3. Not more than ten weeks after the date of such citation. 4. Or, afternoon. See **Henning's General Laws** (Cal.), § 17.

§ 1057. Form. Citation to show cause why tax should not be paid.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The People of the State of ____.

To ____,² Greeting:

By order of this court, You are hereby cited and required to appear before the judge of this court, at the court-room

of Department No. _____ thereof, at the court-house ³ in the county ⁴ of _____, on _____, ⁵ the _____ day of _____, 19____, at _____ o'clock in the forenoon ⁶ of that day, then and there to show cause why the collateral-inheritance tax, now due and unpaid on property belonging to the above-entitled estate, should not be paid.

Witness, the Honorable _____, judge of the court, in and for the county ⁷ of _____, state of _____, with the seal of said court affixed, this _____ day of _____, 19____.

[Seal]

Attest: _____, Clerk.

By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. The executor of the will, or to persons known to own any interest in, or part of the property liable to the tax, or to any person or corporation liable, under the law, for the payment of said tax. 3. Give its location. 4. Or, city and county. 5. Day of week. 6. Or as the case may be. 7. Or, city and county. See *Henning's General Laws* (Cal.), p. 144, § 17.

§ 1058. Form. Bond of beneficiary to state.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.] }

Know all men by these presents, That we, _____ of the county of _____, as principal, and _____ and _____, of the same place, as sureties, are held and firmly bound unto the people of the state of _____, in the penal sum of _____ dollars (\$_____), gold coin of the United States of America, to be paid to the said people of the state of _____, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents.

The condition of the above obligation is such that whereas an inheritance tax of _____ dollars (\$_____), has been assessed against the said _____ on account of a legacy to him under the will of said _____, deceased, and whereas the said _____ has elected not to pay said tax until he shall come into the actual possession or enjoyment of said property, —

Now, if the said _____ shall pay said tax and interest thereon at such time or period as he or his representatives

may come into the actual possession or enjoyment of said property, then this obligation is to be void; otherwise, to remain in full force and effect.

Dated, signed, and sealed with our seals this ____ day
 ____, 19____. (Principal) ____ [Seal]
 (Surety) ____ [Seal]
 (Surety) ____ [Seal]

Explanatory note. 1. Give file number. See *Henning's General Laws* (Cal.), p. 140, § 5.

§ 1059. Form. Bond of executor or administrator.

[Title of court.]

[Title of estate.] { No. ____¹ Dept. No. ____
 [Title of form.] }

(First paragraph the same as in § 1058 supra.)

The condition of the above obligation is such that, whereas, the said ____ is executor of the estate of said ____, deceased, and a collateral-inheritance tax of ____ dollars (\$____), imposed by law upon a legacy to ____, under the will of said testator has not been paid by said executor within eighteen months from the death of decedent, and the estate not being ready for settlement, and the said executor not having sufficient money wherewith to pay said tax, —

Now, if the said executor, as such, shall pay, or cause to be paid, the said tax and all interest thereon as soon as the said ____² shall come into the actual possession or enjoyment of said property, then this obligation is to be void; otherwise, to remain in full force and effect.

Dated, signed, and sealed with our seals this ____ day of
 ____, 19____. (Principal) ____ [Seal]
 (Surety) ____ [Seal]
 (Surety) ____ [Seal]

Explanatory notes. 1. Give file number. 2. Legatee. See *Henning's General Laws* (Cal.), p. 141, § 8.

§ 1060. Form. Table of exemptions¹ and percentages.

The following is a table showing the exemptions and percentages of tax to be paid on property passing by inheritance or otherwise under the act entitled "An act to establish a

Property passing from the estate of a decedent whose death occurred prior to July 1, 1905, would be taxed in accordance with previous acts, which are substantially in effect that all property which shall pass from any person who may die a resident of this state or whose property is within the state, other than for the benefit of his or her father, mother, husband, wife, daughter, issue, wife, or widow of a son, husband of a daughter or any adopted children, is subject to a tax of 5%, except that an estate less than five hundred dollars is exempt.

COLLATERAL-INHERITANCE TAXES.

- | | |
|---|--|
| 1. Right to impose. | (4) Collateral-inheritance tax. |
| 2. Constitutionality of acts. | Liability for. |
| (1) In general. | (5) Same. When payable, with interest. |
| (2) Due process of law. | (6) Same. Computation of primary rates. Exemption. |
| (3) Uniformity of taxation. | 4. Conclusiveness of judgment. |
| (4) Exemptions. | 5. Practice. Collection. State controller. |
| (5) Same. Discrimination. | (1) Practice. Collection. Commission. |
| (6) Conformity of body of act with its title. | (2) Payment of tax should appear in final account. |
| (7) Revision of act, or amendment of section. | (3) Power and duty of state controller. |
| 3. Construction of acts. | 6. Appeal. |
| (1) In general. | |
| (2) Inheritance and taxes. Distinction. | |
| (3) Right of state. | |

1. **Right to impose.** A collateral-inheritance or succession tax is a duty or bonus, exacted in certain instances by the state, upon the right and privilege of taking legacies, inheritances, gifts, and successions passing by will, by intestate laws, or by any deed or instrument made inter vivos, intended to take effect after the death of the grantor. The burden or the tax is not imposed upon the property itself, but upon the privilege of acquiring the property by inheritance. In nearly all inheritance tax laws, the statutes provide for appraising the property to be inherited, but the object of such valuation is not to tax the property itself. It is to arrive at a measure of price by which the privilege of inheritance can be valued: *In re Tuohy's Estate*, 35 Mont. 431; 90 Pac. Rep. 170, 172. Since the tax is imposed upon the privilege of receiving or taking property, and not upon the property itself, and since the privilege is itself not a natural right but a creature of law, it follows, as a corollary, that, except so far as it is clearly restricted by the constitution, the legislature may impose such burdens as it may see fit. The legislative power is not restricted, in this regard, by provisions of the constitution regarding equality and uni-

formity in the levy of ordinary taxes upon property; prescribing a maximum rate for state taxation; fixing the valuation of a certain class of property; or providing for exemptions: *In re Tuohy's Estate*, 35 Mont. 431; 90 Pac. Rep. 170, 172. The right of inheritance, including the designation of heirs and the proportions which the several heirs shall receive, as well as the right of testamentary disposition, are entirely matters of statutory enactment, and within the control of the legislature. As it is only by virtue of the statute that the heir is entitled to receive any of his ancestor's estate, or that the ancestor can divert his estate from the heir, the same authority which confers this privilege may attach to it the condition, that a portion of the estate so received shall be contributed to the state, and the portion thus to be contributed is peculiarly within the legislative discretion: *In re Wilmerding's Estate*, 117 Cal. 281; 49 Pac. Rep. 181, 182.

2. Constitutionality of acts.

(1) **In general.** A collateral-inheritance tax law, which imposes a tax on the privilege of receiving property by will or inheritance, does not change the law of descent: *In re Magnes' Estate*, 32 Col. 527; 77 Pac. Rep. 853, 857.

REFERENCES.

Constitutionality of laws affecting taxation of collateral inheritances: See note 41 Am. St. Rep. 580-585. Constitutionality of succession taxes: See notes 1 Am. & Eng. Ann. Cas. 30; 6 Am. & Eng. Ann. Cas. 579; 7 Am. & Eng. Ann. Cas. 1061; 8 Am. & Eng. Ann. Cas. 159. A statute which imposes an inheritance tax upon foreign corporations is constitutional: See Annotations to *Henning's General Laws*, p. 148.

(2) **Due process of law.** A collateral-inheritance tax law which creates a vested right in the state, upon the death of decedent, is not unconstitutional as depriving the heirs of property "without due process of law," contrary to the fourteenth amendment of the constitution of the United States: *Trippet v. State*, 149 Cal. 521, 529; 86 Pac. Rep. 1084; *Estate of Stanford*, 126 Cal. 112; 45 L. R. A. 788; 54 Pac. Rep. 259; 58 Pac. Rep. 462; *Estate of Campbell*, 143 Cal. 623, 625; 77 Pac. Rep. 674.

(3) **Uniformity of taxation.** A collateral-inheritance tax law which provides for an inheritance tax, of a certain percentage, where the property passes to direct heirs, and for greater percentages where it passes to collateral heirs or strangers to the blood, is not unconstitutional as violating that provision requiring the taxation of property to be uniform: *State v. Clark*, 30 Wash. 439; 71 Pac. Rep. 20, 22. The state may tax privileges, discriminate between relatives, and grant exemptions, and is not precluded from this power by the provisions of

the respective state constitutions requiring uniformity of taxation. Hence an inheritance tax on the privilege of receiving property by will or inheritance does not violate the constitutional provision requiring uniform taxation: *In re Magnes' Estate*, 32 Col. 527; 77 Pac. Rep. 853, 855. Nor does such a tax contravene the constitution as limiting the rate of taxation on property for state purposes: *In re Magnes' Estate*, 32 Col. 527; 77 Pac. Rep. 853, 855, 856; *Dickson v. Ricketts*, 26 Utah, 215; 72 Pac. Rep. 947. A law which imposes a collateral-inheritance tax on all the property in excess of ten thousand dollars, after the payment of debts, does not mean that the tax is to be imposed only on separate portions of the decedent's estate, or any distributive share thereof, exceeding ten thousand dollars, after payment of the indebtedness. The tax authorized by said act should be imposed, by right of devolution and succession, in respect to the whole estate of the decedent above the value of ten thousand dollars, after payment of the indebtedness of the estate. It follows that, where the estate is over the value of ten thousand dollars, after payment of the indebtedness of the estate, the estate could not evade the payment of the tax on the ground that it is not shown that any legatee would receive that sum: *Dickson v. Ricketts*, 26 Utah, 215; 72 Pac. Rep. 947.

(4) **Exemptions.** A collateral-inheritance tax is not unconstitutional because of the fact that it exempts inheritances less than five hundred dollars in value. The tax being not upon property, but upon the right of succession, the constitutional provision that all property shall be taxed according to its value is inapplicable: *Estate of Wilmerding*, 117 Cal. 281; 49 Pac. Rep. 181, 183. Neither is a collateral-inheritance tax law unconstitutional as violating the rule requiring equality in taxation because of the exemption of ten thousand dollars in value from the portion of the estate devised to direct heirs, which exemption is not extended to collateral heirs or strangers to the blood: *State v. Clark*, 30 Wash. 439; 71 Pac. Rep. 20, 23; *Dickson v. Ricketts*, 26 Utah, 215; 72 Pac. Rep. 947.

REFERENCES.

Exemption clauses of succession-tax statutes are constitutional: See note 1 Am. & Eng. Ann. Cas. 30. Exemption of adopted children from succession tax: See note 12 L. R. A. 404, 405.

(5) **Same. Discrimination.** A collateral-inheritance tax law exempting nephews and nieces of the deceased, not resident of this state, is constitutional and valid. It does not violate that section of the constitution of the United States, which provides "that the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states"; though the intention of the legislature, in the law, to leave the tax resting upon non-resident nephews

and nieces, is just as clearly manifest as their intention to relieve resident nephews and nieces: *Estate of Johnson*, 139 Cal. 532, 537; 73 Pac. Rep. 424; overruling *Estate of Mahoney*, 133 Cal. 180; 85 Am. St. Rep. 155; 65 Pac. Rep. 389, on this point. An amendment to a collateral-inheritance tax law, which attempts, retroactively, to exempt resident nieces and nephews, along with certain classes of corporations, from the payment of unpaid taxes upon collateral inheritances, bequests, and devises, makes an unjust discrimination, and violates the constitutional provision forbidding special legislation, releasing any existing obligation to the state, and violates the provision prohibiting donations and gifts from the state to any individual or corporation: *Estate of Stanford*, 126 Cal. 112, 116, 120; 45 L. R. A. 788; 54 Pac. Rep. 259; 58 Pac. Rep. 462. A law imposing a collateral-inheritance tax upon the brothers and sisters of deceased persons, while at the same time exempting from taxation the wife of a son, the widow of a son, and the husband of a daughter, is not unconstitutional as making an unlawful discrimination between brothers and sisters and other parties mentioned in the act. Where the statute imposes an inheritance tax upon all the collateral relations of the deceased, and exempts from taxation the father, mother, husband, wife, lawful issue, and adopted children, and any lineal descendant of deceased born in lawful wedlock, the distinction as to inheritances between those in the direct line and collateral relations is a natural distinction, and is sufficient to justify the legislature in imposing a different rule on this subject with respect to each. Where the statute also exempts the wife or widow of a son, and the husband of a daughter, who are strangers to the blood, and who, under the statute of succession, do not inherit, the exemption in these latter cases can apply only to bequests and devises. The class composed of sons-in-law and daughters-in-law, though not of the blood of the testator, are very closely related by affinity; and a court will not interfere with the legislative discretion, and say that the distinction is not natural. It is sufficient, at least, to justify the legislature in exempting these persons from the tax: *Estate of Campbell*, 143 Cal. 623, 627; 77 Pac. Rep. 674. Nor is such a law unconstitutional because it imposes a tax upon bequests and devises to persons not of kin to the testator; that is, upon all persons strangers to the blood other than the wife or widow of the son or husband of the daughter, and that these classes of persons, upon whom the tax is thus imposed, are not embraced within the terms of the title of the act: *Estate of Campbell*, 143 Cal. 623, 628; 77 Pac. Rep. 674.

(6) **Conformity of body of act with its title.** A collateral-inheritance tax law will not be pronounced unconstitutional on the ground that the body of the act, because of a mere clerical error, does not conform to the title, where it is manifest that the defect complained of is not in the title, but in the body of the act. If the act can be

given construction which is reasonable, and which will make it constitutional, that construction must prevail: *Estate of Campbell*, 143 Cal. 623; 77 Pac. Rep. 674. Nor is such a law unconstitutional because it contains a provision imposing taxes upon property transferred by deed, grant, sale, or gift, made to take effect in possession or enjoyment after the death of the decedent, and that this class of dispositions of property is not expressed in the title of the act: *Estate of Campbell*, 143 Cal. 623, 629; 77 Pac. Rep. 674. In revenue laws, the term "inheritance tax" is almost universally employed to designate or describe a tax on the right of succession, whether by operation of law, by will, or by grant; and the title of an act entitled, "an act relating to the taxation of inheritances and providing for disposition of same," is broad enough to sustain the provision imposing a tax upon property which passes by will, or otherwise than by operation of law: *In re White's Estate*, 42 Wash. 360; 84 Pac. Rep. 831, 832.

(7) **Revision of act, or amendment of section.** A collateral-inheritance tax law is not unconstitutional as violating that section of the constitution which provides that an act revised, or a section amended, must be reenacted and published at length as revised or amended, though the title of the act indicates that it is an amendment to an entire act, but, in fact, the amendment made is all comprised in a single section thereof. In such a case, it is not necessary to republish the entire act. It is a sufficient compliance with the constitutional requirement, if the section which is amended is republished at length as amended: *Estate of Campbell*, 143 Cal. 623, 627; 77 Pac. Rep. 674.

3. Construction of acts.

(1) **In general.** It is the general doctrine that a succession tax is construed strictly against the government and in favor of the taxpayer. A succession tax is a special tax, and where the question is involved in doubt, the doubt should be resolved in favor of the taxpayer and against the taxing power: *People v. Koenig* (Col.), 85 Pac. Rep. 1129, 1130. A collateral-inheritance tax law, relating to "collateral inheritances, bequests, and devises," only, must be limited to the subjects thus described, and would exclude successions or bequests to children or grandchildren, either adopted or natural; for clearly they are not collateral, but in a direct line: *Estate of Winchester*, 140 Cal. 468; 74 Pac. Rep. 10, 11. The rule that a tax law is to be construed strictly extends to exemptions as well as impositions; and a strict construction should be indulged against a rule of exemption that is unequal and unjust: *Estate of Bull* (Cal.), 96 Pac. Rep. 366.

REFERENCES.

For reference to statutes which it is assumed the California inheritance tax law of March 20, 1905, fully supersedes: See Annotations to

Henning's General Laws, p. 148. For reference to decisions concerning the inheritance-tax laws of Illinois, Iowa, Maine, New York, and Ohio: See Annotations to **Henning's General Laws**, p. 148. Succession or inheritance tax: See notes 2 L. R. A. 826; 12 L. R. A. 402. Time for taxing future estates under succession-tax acts: See note 5 Am. & Eng. Ann. Cas. 237. Situs of decedent's personal property for purposes of taxation: See note 1 Am. & Eng. Ann. Cas. 438.

(2) **Inheritance and taxes. Distinction.** There is no necessary connection between inheritance and taxes, and the legislature, in making laws relating to these two subjects, is not required to consider them together. Having plenary authority in reference to each, it is not required to shape its legislation concerning one in the form or with any regard to the manner in which it has shaped it concerning the other; and the fact that, in making provisions for succession, it has placed relatives of different degrees to the deceased, in the same class of successors, does not require it to observe the same classification in legislating for a purpose entirely distinct from inheritance: *Estate of Wilmerding*, 117 Cal. 281, 286, 287; 49 Pac. Rep. 181. A collateral-inheritance tax is not one of the expenses of administration, or a charge on the general estate of a decedent, but is in the nature of an impost tax, or tax upon the right of succession, and is imposed on the several amounts of the decedent's estate to which the successors thereto are respectively entitled. The tax is computed, not on the aggregate valuation of the whole of the estate of the decedent, considered as the unit for taxation, but on the value of the separate interests into which it is divided by the will, or by the statute laws of the state, and is a charge on each share or interest, according to its value, and against the person entitled thereto: *Estate of Chesney*, 1 Cal. App. 30, 33; 81 Pac. Rep. 679.

(3) **Right of state.** The state's ownership of a collateral-inheritance tax does not depend upon its payment, or possession by the state alone, but upon the right to possess it, which attached at the time of the death of deceased: *Estate of Stanford*, 126 Cal. 112, 119; 45 L. R. A. 788; 54 Pac. Rep. 259; 58 Pac. Rep. 462. The right of the state to a collateral-inheritance tax, which vested upon the death of the decedent, cannot be divested, retroactively, by the subsequent amendment and alteration of the statute under which the right of the state accrued: *Estate of Stanford*, 126 Cal. 112, 121; 45 L. R. A. 788; 54 Pac. Rep. 259; 58 Pac. Rep. 462. The right to a collateral-inheritance tax, which became vested at the death of a decedent, cannot be surrendered by a subsequent legislative act: *Estate of Lander*, 6 Cal. App. 744, 747; 93 Pac. Rep. 202. Where a collateral-inheritance tax law creates a vested right in the state, at the time of the death of the decedent, to the tax imposed, a subsequent statute constituting a

new law on the subject, and expressly repealing the old law, does not affect the right to collect taxes on the estates of persons dying before the latter act went into effect: *Trippet v. State*, 149 Cal. 521; 86 Pac. Rep. 1084, 1085. The mere fact that the right of the state to its proportion of the gift or inheritance is declared to vest prior to any appraisement, does not deprive the beneficiary or heir of any substantial right, where the law affords him the opportunity to be heard, as to the amount of the tax, before there is any actual collection or payment thereof: *Trippet v. State*, 149 Cal. 521, 530; 86 Pac. Rep. 1084.

REFERENCES.

Prospective or retrospective operation of succession-tax acts: See notes 2 Am. & Eng. Ann. Cas. 608; 8 Am. & Eng. Ann. Cas. 218.

(4) **Collateral-inheritance tax. Liability for.** The law in force at the time of decedent's death governs in determining the amount of a collateral-inheritance tax to be paid by those who succeed to his estate: *Estate of Woodard* (Cal.), 94 Pac. Rep. 242. Nephews and nieces are not liable for a collateral-inheritance tax, under the California statute: *Estate of Johnson*, 139 Cal. 532, 540; 96 Am. St. Rep. 161; 73 Pac. Rep. 424; reversing *Estate of Mahoney*, 133 Cal. 180; 85 Am. St. Rep. 155; 65 Pac. Rep. 389. The surviving wife's share of the community property is subject to a collateral-inheritance tax: *Estate of Moffitt* (Cal.), 95 Pac. Rep. 653, 654. The expression, "increase of all property," in a collateral-inheritance tax law, which provides that the tax shall be levied and collected upon the increase of all property arising between the date of death and the date of the decree of distribution, includes augmentation in value as well as multiplication in kind. The intention of such a statute is to make the imposition apply to the increase of all property of whatever kind and description: *In re Tuohy's Estate*, 35 Mont. 431; 90 Pac. Rep. 170, 173. A sum of money paid by an executor to an heir, to withdraw a will contest instituted by such heir, is taxable under a law imposing a collateral-inheritance tax on property passing by will, or by the intestate laws of the state: *People v. Rice* (Col.), 91 Pac. Rep. 33, 34. In Montana, real estate devised by a testator to his widow is not subject to a collateral-inheritance tax. Where the legislature, by expressly including personalty only, carefully avoided taxing real property passing to those favored by the law, the court is not authorized to insert what they omitted: *Hinz v. Wilcox*, 24 Mont. 4; 55 Pac. Rep. 355, 357. Under the provisions of a collateral-inheritance tax law, establishing a tax upon "collateral inheritances, bequests, and devises," legacies in trust, for the benefit of the children of the adopted daughter of a deceased testator, are not subject to the tax: *Estate of Winchester*, 140 Cal. 468, 470; 74 Pac. Rep. 10. Under a collateral-inheritance tax law, which excepts from its provisions, in addition to the father, mother,

husband, wife, lawful issue, etc., "any child or children adopted as such," in conformity with law, and any "lineal descendant of such decedent born in lawful wedlock," legacies left to the children of an adopted child are not subject to the tax: *Estate of Winchester*, 140 Cal. 468; 74 Pac. Rep. 10. If a resident of another state dies, leaving property in this state, an executor here, of a will probated in such other state, is not chargeable in this state with an inheritance tax on legacies to collateral heirs and strangers, paid in the former state out of the proceeds of property situated in that state: *In re Clark's Estate*, 37 Wash. 671; 80 Pac. Rep. 267, 268. Where the statute specifically declares that the rate of tax is upon the market value of the property received by each person, and provides that the sum of ten thousand dollars of any such estate shall not be subject to any such duty or taxes, and that only the amount in excess of ten thousand dollars shall be subject to the duty or tax, the tax is not upon the whole estate, but only upon so much of it as passes to certain persons, and, although the executor is compelled to pay it, he is required to deduct it from the particular legacy or legacies, and no beneficiary is liable, except on the share he actually receives: *People v. Koenig* (Col.), 85 Pac. Rep. 1129, 1130, 1131.

REFERENCES.

Application of collateral-inheritance tax to adopted children: See note 12 L. R. A. 404-405. Collateral-inheritance tax; land in other states: See note 1 L. R. A. (N. S.) 400. Succession tax on money paid in compromise of contest of will: See note 6 Am. & Eng. Ann. Cas. 572. Liability of transfer of United States, and other governmental, bonds or securities to succession tax: See note 5 Am. & Eng. Ann. Cas. 874. Liability of foreign charitable corporations for inheritance tax on bequests to them: See notes 1 Am. & Eng. Ann. Cas. 239; 6 Am. & Eng. Ann. Cas. 579; 8 Am. & Eng. Ann. Cas. 159.

(5) **Same. When payable, with interest.** The law does not require that all the taxes from all beneficiaries should be paid at one time, and the payment represented in one receipt: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 335. Under a collateral-inheritance tax law which provides that the tax shall be due, at the death of the decedent, and payable with interest at the rate of six per cent on the taxes until such time as they are paid, such taxes are payable on an estate passing under a will with six per cent interest from the time of the testator's death, notwithstanding subsequent proceedings contesting the will and other litigation, during which time it could not be determined, until after the termination of such proceedings, what rate should be paid: *People v. Rice* (Col.), 91 Pac. Rep. 33, 35.

(6) **Same. Computation of primary rates. Exemption.** In the California collateral-inheritance tax law of March 20, 1905 (Stats.

1905, p. 342, c. 314), the legislature intended that the "primary rates" were to be computed in all cases. Section 2 of that act does not relate exclusively to estates not exceeding twenty-five thousand dollars: *Estate of Bull* (Cal.), 96 Pac. Rep. 366. In the case of estates exceeding twenty-five thousand dollars in value, there is a tax imposed according to a sliding scale, on the excess over twenty-five thousand dollars, but the collateral-inheritance tax law of California does not exempt the first twenty-five thousand dollars from the payment of such tax: *Estate of Bull* (Cal.), 96 Pac. Rep. 366; compare *People v. Koenig* (Col.), 85 Pac. Rep. 1129, 1130, 1131. See head-line 3, subd. (4), *supra*.

4. **Conclusiveness of judgment.** After a court has heard and determined a question relative to a collateral-inheritance tax, its order or judgment is conclusive, subject only to be reviewed on appeal: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 335.

5. **Practice. Collection. State controller.**

(1) **Practice. Collection. Commission.** The practice throughout the state of California, respecting the matter of fixing a collateral-inheritance tax, has not been uniform, — some judges taking the inventory and appraisement as the basis, while others cause an appraisement to be made under the inheritance tax law, and still others resort to both methods. It would seem to be the better and more equitable course to appoint appraisers, for, by that means, all interested parties, including the state, are served with notice, and are given an opportunity to be heard in the important matter of fixing a basis for the tax: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 334. It may here be observed that, although an appraiser has been appointed, and an order made fixing the amount of a collateral-inheritance tax upon an estate of great value, if it comes to the knowledge of the judge that the figures given in the appraisement represent very much less than the value of the property, he may very properly revoke the order and appoint a special appraiser whom he believes will render a true report. The inheritance tax has become an important factor in the revenue system of the state, and it should be collected as closely as any other impost. The rendering of a report is not a mere neighborly act or personal favor, but a sworn duty, and the tendency to make undervaluations, without any sense of criminality in so doing, can only be checked by vigilance on the part of the judge having jurisdiction of the matter. To make the proper collection of inheritance taxes, undervaluations and other frauds and evasions must be prevented by him. The question as to whether the homestead, family allowance, expenses of administration, and debts of decedent — either or all — should be excluded from the value of the estate, and the balance only made the subject of the tax, is one of construction of the statute, and has never

been decided by the supreme court of California. "The decisions in other states, influenced, no doubt, by divergencies in the statutes themselves, are not harmonious, some holding that only the exemptions enumerated in the statute should be deducted, others holding that debts, but not the other items, should be exempt, and still others that all the above items should be exempt. There is likewise some disagreement as to whether the rents, issues, and profits should be taken into account, and the state given a tax upon accumulations. There is also a question as to what point of time should be taken for the valuation of the estate — whether at the death of decedent, at which time the right of the state is vested, under our law, or at the time of the appraisal": *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 335. In California, the statute giving a county treasurer a commission on collections made by him for the state inheritance tax, was repealed by the county government act: *San Diego County v. Schwartz*, 145 Cal. 49; 78 Pac. Rep. 231, 232.

(2) **Payment of tax should appear in final account.** The final account must be rendered, settled, and allowed before final distribution, and such account cannot be rendered and settled until after the amount of the collateral-inheritance tax is finally determined, so that its payment can be made to appear in the final account: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 334. Before distribution can be had, the collateral-inheritance tax must be paid, and until that is done, the estate is not in a condition to be closed: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 334; *Estate of Lander*, 6 Cal. App. 744; 93 Pac. Rep. 202. At the time the final account is settled, the receipt for payment of the collateral-inheritance tax should show that it has been countersigned by the controller. The settlement and approval of the final account, without such action by the controller, would probably be premature: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 334.

(3) **Power and duty of state controller.** The state controller has no revisory power in the matter of fixing the amount of a collateral-inheritance tax, or in determining whether the court has rightly fixed it: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 335. The state controller of California does not figure in any part of the machinery provided for the collection of such a tax, or its enforcement; and where the court has decided, with reference to such a tax, in any particular case, the controller has no discretion, but should countersign and affix his seal to a receipt of payment, to the county treasurer, of the amount on account of inheritance tax in the matter of the particular estate: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 335. It is the duty of the state controller to countersign receipts for the payment of collateral-inheritance taxes, and he may be compelled to do so by a writ of mandamus: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 335.

6. **Appeal.** The state has a right to appeal from an order or decree of the superior court fixing the amount of a collateral-inheritance tax, as the state is an interested party: *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 335. An appeal may be taken from an order directing the payment of a collateral-inheritance tax as a claim against the estate, or from a decree of distribution directing the deduction of the tax; and the state, being an interested party, may, through the district attorney or attorney-general, avail itself of such right of appeal: *Frost v. Superior Court*, 2 Cal. App. 342, 344; 83 Pac. Rep. 815; *Becker v. Nye* (Cal. App.), 96 Pac. Rep. 333, 335.

PART XX.

APPEAL.

CHAPTER I.

APPEAL.

- § 1061. Appeal may be taken when.
- § 1062. Appeal by executor, administrator, or guardian.
- § 1063. Appeal in probate proceedings. Preference.
- § 1064. Reversal of order of appointment. Effect of.

APPEAL.

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§ 1061. **Appeal may be taken when.** An appeal may be taken to the supreme court, from a superior court, in the following cases:

3. From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, administrator, or guardian; or refusing, allowing, or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, or legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser or appraisers setting apart a homestead. **Kerr's Cyc. Code Civ. Proc., § 963.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 940, p. 337.

Arizona. Rev. Stats. 1901, par. 1945.

Idaho. Code Civ. Proc. 1901, sec. 4399.

Kansas. Gen. Stats. 1905, §§ 3063, 3425.

Nevada. Comp. Laws, sec. 3041.

Oklahoma. Rev. Stats. 1903, sec. 1763.

South Dakota. Probate Code 1904, § 345.

Washington. Pierce's Code, § 1299.

§ 1062. **Appeal by executor, administrator, or guardian.** When an executor, administrator, or guardian, who has given an official bond, appeals from a judgment or order of

the superior court made in the proceedings had upon the estate of which he is executor, administrator, or guardian, his official bond shall stand in the place of an undertaking on appeal; and the sureties thereon shall be liable as on such undertaking. **Kerr's Cyc. Code Civ. Proc.**, § 965.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Arizona. Rev. Stats. 1901, par. 1947.

Idaho.* Code Civ. Proc. 1901, sec. 4400.

Kansas. Gen. Stats. 1905, § 3066.

Nevada. Comp. Laws, sec. 3043.

North Dakota. Rev. Codes 1905, § 7968.

Oklahoma. Rev. Stats. 1903, secs. 1798, 1799, 1812.

South Dakota. Probate Code 1904, § 364.

§ 1063. Appeal in probate proceedings. Preference.

Appeals in probate proceedings and contested election cases shall be given preference in hearing in the supreme court, and be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties. **Kerr's Cyc. Code Civ. Proc.**, § 57.

§ 1064. Reversal of order of appointment. Effect of.

When the judgment or order appointing an executor, or administrator, or guardian, is reversed on appeal, for error, and not for want of jurisdiction of the court, all lawful acts in administration upon the estate performed by such executor, or administrator, or guardian, if he have qualified, are as valid as if such judgment or order had been affirmed. **Kerr's Cyc. Code Civ. Proc.**, § 966.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho. Code Civ. Proc. 1901, sec. 4401.

Nevada. Comp. Laws, sec. 3044.

North Dakota. Rev. Codes 1905, § 7987.

Oklahoma.* Rev. Stats. 1903, sec. 1813.

South Dakota.* Probate Code 1904, § 365.

Utah. Rev. Stats. 1898, sec. 4043.

APPEAL.

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1. Right of appeal.

(1) In general. The right of appeal, in probate matters, given by the constitution, should be liberally construed: Estate of Scott, 124

Cal. 671, 675; 57 Pac. Rep. 654. An appeal, in probate cases, takes precedence over all other cases, except those to which the people of the state are parties. The purpose of giving this preference or priority is to favor the speedy settlement of the estates of deceased persons: *Estate of Heywood* (Cal.), 97 Pac. Rep. 825, 827. With respect to the right of appeal, it is immaterial whether a proceeding in probate is, for certain purposes, a civil case or a special proceeding, or whether, in certain aspects, an order in probate is a final judgment: *Estate of Winslow*, 128 Cal. 311, 312; 60 Pac. Rep. 931. The remedy for one aggrieved by an order or judgment of the probate court is in said court, by a proper motion or by appeal: *Clark v. Rossier*, 10 Ida. 348; 78 Pac. Rep. 358. The right to have an appealable order reviewed for error is lost by failure to appeal therefrom: *Gruwell v. Seybolt*, 82 Cal. 7, 10; 22 Pac. Rep. 938. If an appealable order is not appealed from, and no motion is made to set it aside, it becomes final, and is conclusive as to the matters comprised therein: *Estate of Nolan*, 145 Cal. 559, 561; 79 Pac. Rep. 428. Although an order settling an account, as well as a decree of distribution, were both made at the same time, and are included in the same paper under one signature of the judge, this fact does not affect the right of an appeal from either order, as each of the orders is appealable: *Estate of Delaney*, 110 Cal. 563, 567; 42 Pac. Rep. 981. The right to appeal from an order, directing a conveyance of real estate in probate proceedings, does not authorize an appeal from an order directing the execution of a lease of realty, because the word "conveyance" does not include a lease: *In re Tuohy's Estate*, 23 Mont. 305; 58 Pac. Rep. 722, 723.

(2) **How limited.** Appeals in probate matters can only be taken from such judgments and orders as are mentioned in the statute authorizing an appeal: *Estate of Edelman*, 148 Cal. 233; 82 Pac. Rep. 962, 963; *Estate of Cahill*, 142 Cal. 628; 76 Pac. Rep. 383; *Estate of Winslow*, 128 Cal. 311; 60 Pac. Rep. 931; *Estate of Hickey*, 121 Cal. 378; 53 Pac. Rep. 818; *Estate of Wittmeier*, 118 Cal. 255; 50 Pac. Rep. 393; *Estate of Walkerly*, 94 Cal. 352; 29 Pac. Rep. 719; *Estate of Moore*, 86 Cal. 58; 24 Pac. Rep. 816; *In re Tuohy's Estate*, 23 Mont. 305; 58 Pac. Rep. 722; *Estate of Bouyssou*, 1 Cal. App. 657; 82 Pac. Rep. 1066; *Estate of Ohm*, 82 Cal. 160, 163; 22 Pac. Rep. 927. Orders refusing to vacate a decree of distribution and settlement of final account, and refusing to vacate an order settling an administrator's account and discharging him, are not among the judgments or orders enumerated in the Montana statute as appealable, and the court therefore has no jurisdiction to entertain an appeal from such orders in that state: *In re Kelly's Estate*, 31 Mont. 356; 78 Pac. Rep. 579.

(3) **Non-application of code provisions.** The provisions of subdivision 2 of section 963 of the Code of Civil Procedure of California, relating to Probate — 112

tive to appeals from orders made after final judgment, are not applicable to probate proceedings: *Estate of Wittmeier*, 118 Cal. 255; 50 Pac. Rep. 393; *Estate of Cahill*, 142 Cal. 628; 76 Pac. Rep. 383. See *Estate of Bauquier*, 88 Cal. 302; 26 Pac. Rep. 532.

2. New trial and appeal.

(1) **In general.** It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings, but it may be said, generally, that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts, which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises, which, after its decision, may be reexamined by the court upon a motion for a new trial: *Estate of Bauquier*, 88 Cal. 302, 315; 26 Pac. Rep. 532. A motion for a new trial is not authorized in a case where *ex parte* applications for letters of administration are had together, and no issues of fact are made by the pleadings. And if such a motion is made, but is not entertained and is denied by the court, no appeal will lie from such an order: *Estate of Heldt*, 98 Cal. 553, 554; 33 Pac. Rep. 549. The power to order a new trial does not exist in cases of appeal from the decrees of the county court in probate matters: *In re Roach's Estate* (Or.), 92 Pac. Rep. 118, 123.

(2) **Application of code provisions.** It is only those provisions of the code relative to new trials and appeals, which are consistent with the provisions of the probate act, that apply to probate proceedings. It was evidently the intention of those who framed and adopted the provisions of the court relative to probate proceedings to curtail dilatory proceedings in the settlement of an estate: *Leach v. Pierce*, 93 Cal. 614, 618; 29 Pac. Rep. 235; *Estate of Franklin*, 133 Cal. 584, 585; 65 Pac. Rep. 1081; and see § 825, ante. The mode and manner of settling the accounts of an executor or administrator is specially provided for in the probate act, and, if followed, is inconsistent with the provisions relating to new trial. Hence a motion for a new trial is a proceeding not applicable to the case of an order settling the annual account of an executor: *Estate of Franklin*, 133 Cal. 584, 585; 65 Pac. Rep. 1081. A motion for a new trial will not be entertained, in proceedings under sections 1465 and 1466 of the Code of Civil Procedure of California, to set apart a homestead, or exempt personal property, or for a family allowance: *Estate of Heywood* (Cal.), 97 Pac. Rep. 825, 826. Under subdivision 2, section 1722 of the Montana Code of Civil Procedure, an appeal lies from a decree ordering the distribution of an estate, and from an order denying a new trial. That provision applies to matters in probate proceedings as well as to ordinary civil cases: *In re Davis' Estate*, 27 Mont. 235; 70 Pac. Rep. 721, 724.

(3) **Appeal from order denying new trial.** In cases where a motion for a new trial may be made, an appeal lies from an order denying it, although the record on appeal contains no statement or bill of exceptions, properly settled, upon which it is predicated: *In re Davis' Estate*, 27 Mont. 235; 70 Pac. Rep. 721, 724. In Montana, an appeal may be taken from an order denying a motion for a new trial in proceedings for the distribution of an estate: *In re Davis' Estate*, 27 Mont. 235; 70 Pac. Rep. 721, 724. An appeal from an order denying a new trial will not be dismissed upon the ground of any defect in the proceedings in the superior court leading up to the order, or because the court below improperly made the order: *Estate of Scott*, 124 Cal. 671, 673; 57 Pac. Rep. 654. An order denying a new trial, if made upon a motion to reject or to vacate a non-appealable order, is not appealable: *Estate of Keane*, 56 Cal. 407, 409. An executor and legatee may move for a new trial of issues as to persons entitled to share in the estate of a testator, and appeal from the order denying the motion, and from so much of an order as adjudges that such persons are so entitled to share: *In re Klein's Estate*, 35 Mont. 185; 88 Pac. Rep. 798, 801.

REFERENCES.

New trials and appeals: See § 825, ante.

3. **Who may appeal. Executor or administrator.** The statute "gives the right of appeal to any party 'aggrieved' by the action of the court, whether he be 'interested' in (*italicized in the opinion*) the estate or not": *Estate of Pearsons*, 98 Cal. 603, 605; 33 Pac. Rep. 451. Where an order is made, in a proceeding against the estate of a deceased person, to which the administrator is a party, that is prejudicial to the interest which it is his duty to protect, he may appeal therefrom in his representative capacity: *Denison v. Jerome* (Col.), 96 Pac. Rep. 166, 168. An administrator, as such, has the right of an appeal from an order settling his account, and the right to do so cannot be affected by any order revoking his letters: *Estate of McPhee* (Cal.), 97 Pac. Rep. 878, 881. An administrator with the will annexed, and an heir of a beneficiary to the decedent's will, have a right to appeal from a decree granting a distribution of the estate. They are parties "aggrieved": *In re Davis' Estate*, 27 Mont. 235; 70 Pac. Rep. 721, 724. An executor may appeal from an order of partial distribution: *Estate of Mitchell*, 121 Cal. 391, 393; 53 Pac. Rep. 810. An administrator, being a party "aggrieved" by a premature order directing the payment of a preferred claim, has a right to appeal therefrom: *Estate of Smith*, 117 Cal. 505, 508; 49 Pac. Rep. 456. In general, an executor has no right of appeal from a decree fixing conflicting rights of heirs and devisees, and distributing the estate accordingly: *Estate of Welch*, 106 Cal. 427, 429; 39 Pac. Rep. 805. An appeal is properly prosecuted by the administrator of

plaintiff who dies pending the appeal: *Wright v. Northern Pac. Ry. Co.*, 45 Wash. 432; 88 Pac. Rep. 832, 833.

REFERENCES.

Right of executor or administrator to appeal as party "aggrieved": See note 13 L. R. A. 745.

4. **Time for taking.** The time for appealing from probate orders, judgments, and decrees is limited, by section 1715 of the Code of Civil Procedure of California, to sixty days from the date of entry, and the appellate court has no jurisdiction of an appeal attempted after the lapse of that time: *Estate of Fay*, 145 Cal. 82; 104 Am. St. Rep. 17; 78 Pac. Rep. 340; *Estate of Campbell*, 141 Cal. 72; 74 Pac. Rep. 550; *Estate of Hughston*, 133 Cal. 321; 65 Pac. Rep. 742, 1039; *Estate of Heldt*, 98 Cal. 553; 33 Pac. Rep. 549; *Estate of Backus*, 95 Cal. 671; 30 Pac. Rep. 796; *Estate of Fisher*, 75 Cal. 523; 17 Pac. Rep. 640; *Estate of Burton*, 64 Cal. 428; 1 Pac. Rep. 702; *Estate of Harland*, 64 Cal. 379; 1 Pac. Rep. 159. The time for taking an appeal from a probate order begins to run from the entry of such order in the minute-book of the court: *Tracy v. Coffey* (Cal.), 95 Pac. Rep. 150, 151; *Estate of Pearsons*, 119 Cal. 27; 50 Pac. Rep. 929; *Estate of Scott*, 124 Cal. 671, 676; 57 Pac. Rep. 654; *Estate of Sheid*, 122 Cal. 528; 55 Pac. Rep. 328.

REFERENCES.

Appeal must be taken within what time: See § 826, ante.

5. Appealable orders.

(1) **Appealable orders.** In general. The following orders are appealable: That part of an order vacating the appointment of an administrator: *Estate of Bouyssou*, 1 Cal. App. 657; 82 Pac. Rep. 1066, 1067; an order denying a new trial to one who has made application for the issuance of letters testamentary to one named as executrix in the will, where there has been a judgment of incompetency against her, and a denial of her application: *Estate of Bauquier*, 88 Cal. 302, 313; 26 Pac. Rep. 178, 532; and an order setting apart a homestead: *Gruwell v. Seyboldt*, 82 Cal. 7, 10; 22 Pac. Rep. 938; *Estate of Burns*, 54 Cal. 223, 228. An appealable order of the probate court is to be treated as final, and is conclusive of the matter determined: *Estate of Stott*, 52 Cal. 403, 406. A writ of prohibition will not lie to prohibit the enforcement of an appealable order: *Murphy v. Superior Court*, 84 Cal. 592; 24 Pac. Rep. 310, 311. A motion to dismiss an appealable order will be denied: *Estate of Bouyssou*, 1 Cal. App. 657; 82 Pac. Rep. 1066.

(2) **Appealable orders.** **Payment of claims.** The following orders are appealable: An order directing the payment of a debt or claim,

irrespective of its amount: *Ex parte Orford*, 102 Cal. 656, 657; 36 Pac. Rep. 928; an order dismissing a petition to have an administrator show cause why a claim that has been allowed shall not be paid: *Estate of McKinley*, 49 Cal. 152, 153; and an order directing the payment of a preferred claim, notwithstanding a previous adjudication that it was a preferred claim, from which no appeal has been taken: *Estate of Smith*, 117 Cal. 505, 507; 49 Pac. Rep. 456.

(3) **Appealable orders. Attorneys' fees.** The following orders are appealable: An order allowing an attorney's fee to the attorney of the executor: *Estate of Kruger*, 123 Cal. 391, 392; 55 Pac. Rep. 1056; an order directing the payment of a claim for attorneys' services, which claim has been allowed and ordered to be paid by the probate court: *Stuttmeister v. Superior Court*, 72 Cal. 487, 489; 14 Pac. Rep. 35; and an order making an allowance to an administrator for the services of himself and his attorney, where such order has been entered in the form of a judgment of the court, and the sum is found to be reasonable: *In re Sullivan's Estate*, 36 Wash. 217; 78 Pac. Rep. 945, 947.

(4) **Appealable orders. Family allowance.** The following orders are appealable: An order granting a family allowance to the widow: *Estate of Stevens*, 83 Cal. 322, 326; 17 Am. St. Rep. 252; 23 Pac. Rep. 379; *Estate of Nolan*, 145 Cal. 559, 561; 79 Pac. Rep. 428; *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38, 41; and an order refusing a family allowance to an alleged widow, or to set aside a homestead to her: *Estate of Harrington*, 147 Cal. 124; 81 Pac. Rep. 546, 548. After an appeal has been perfected from an order requiring the administrator to pay a family allowance, the court has no power to make a further order directing the administrator to make such payment: *Pennie v. Superior Court*, 89 Cal. 31; 26 Pac. Rep. 617.

(5) **Appealable orders. Settlement of accounts.** The following orders are appealable: An order settling the account of an administrator or executor, irrespective of the amount involved: *Estate of Rose*, 80 Cal. 166, 170; 22 Pac. Rep. 86; *Estate of Grant*, 131 Cal. 426; 63 Pac. Rep. 731; *Estate of Delaney*, 110 Cal. 563, 567; 42 Pac. Rep. 981; an order settling an account, as well as a decree of distribution: *Estate of Delaney*, 110 Cal. 563, 567; 42 Pac. Rep. 981; an order settling the account of an executor or administrator, but not discharging him from his trust: *Estate of Rose*, 80 Cal. 166, 170; 22 Pac. Rep. 86; *Estate of Coutts*, 87 Cal. 480; 25 Pac. Rep. 685; *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38; *Broadwater v. Richards*, 4 Mont. 52, 80; 2 Pac. Rep. 544; and a decree disallowing the final account of an executor or administrator: *Rostel v. Morat*, 19 Or. 181; 23 Pac. Rep. 900, 901.

(6) **Appealable orders. Distribution.** The following orders are appealable: A decree of final distribution: *Daly v. Pennie*, 86 Cal. 552, 553; 21 Am. St. Rep. 61; 25 Pac. Rep. 67; a decree of distribution, by the district court, in a probate proceeding pending before it: *In re McFarland's Estate*, 10 Mont. 445; 26 Pac. Rep. 185, 189; and an order of partial distribution of an estate of a deceased person, upon the petition of the legatee: *Estate of Mitchell*, 121 Cal. 391, 393; 53 Pac. Rep. 810.

(7) **Appealable orders. Sale. Mortgage. Conveyance.** The following orders are appealable: An order of the probate court directing the sale of real estate: *Stuttmeister v. Superior Court*, 71 Cal. 322, 323; 12 Pac. Rep. 270; an order of the probate court, confirming an executor's sale, and directing a conveyance to be made to the purchaser: *Estate of Pearsons*, 98 Cal. 603, 605; 33 Pac. Rep. 451; an order confirming the sale of the real property of a decedent, made under a power of sale contained in the will, and directing a conveyance to the purchaser: *Estate of Pearsons*, 98 Cal. 603, 605; 23 Pac. Rep. 451; an order directing the sale of real property which had been sold by the administrator, and the sale confirmed: *Estate of Boland*, 55 Cal. 310, 311; an order refusing the confirmation of a sale of real estate and refusing to hear evidence upon the return, as this is virtually "an order against directing the sale or conveyance of real estate": *Estate of Leonis*, 138 Cal. 194, 197; 71 Pac. Rep. 171; an order authorizing an executor to mortgage lands of the estate, as this is an order directing a conveyance of real property: *Estate of McConnell*, 74 Cal. 217, 218; 15 Pac. Rep. 746; and an order directing or refusing to direct a conveyance of real estate by an executor or administrator: *Estate of Corwin*, 61 Cal. 160, 163.

(8) **Appealable orders. Guardians.** The following orders are appealable: An order directing a person, as guardian, who has received property for the benefit of minors by a deed of trust, to pay for their support: *Murphy v. Superior Court*, 84 Cal. 592; 24 Pac. Rep. 310, 311; an erroneous order requiring a guardian to pay for the maintenance of his ward: *Murphy v. Superior Court*, 84 Cal. 592, 598; 24 Pac. Rep. 310; and an order of the probate court appointing a guardian of a minor: *Guardianship of Get Young*, 90 Cal. 77, 78; 27 Pac. Rep. 158.

(9) **Appealable orders. Contests over probate of wills.** Prior to 1901, section 963, subdivision 3, of the Code of Civil Procedure of California, did not authorize an appeal from an order or judgment refusing to revoke the probate of a will: *Estate of Winslow*, 128 Cal. 311; 60 Pac. Rep. 931; but that statute has been enlarged, by amendment, so as to include, "or refusing to revoke the probate of

a will." This removes any question as to the right of appeal from a judgment or order refusing to revoke the probate of a will, and the older authorities have no bearing on the question: *Hartmann v. Smith*, 140 Cal. 461, 467; 74 Pac. Rep. 7. An order refusing to revoke the probate of the will of a deceased person is appealable: *Hartmann v. Smith*, 140 Cal. 461, 467; 74 Pac. Rep. 7; *Estate of Hughston*, 133 Cal. 321, 322; 65 Pac. Rep. 742, 1039; so is an order revoking the probate of an alleged will and of letters testamentary: *Estate of Crozier*, 65 Cal. 332; 4 Pac. Rep. 109, 110; and an order refusing the probate of a holographic will: *Estate of Fay*, 145 Cal. 82, 87; 104 Am. St. Rep. 17; 78 Pac. Rep. 340. Where there is an appeal from a judgment or order in a contest over the probate of a will, an appeal lies from an order denying a motion for a new trial therein: *Hartmann v. Smith*, 140 Cal. 461, 467; 74 Pac. Rep. 7; *Estate of Spencer*, 96 Cal. 448, 449; 31 Pac. Rep. 453. See *Estate of Smith*, 98 Cal. 636; 33 Pac. Rep. 744; *Estate of Doyle*, 73 Cal. 564; 15 Pac. Rep. 125; 68 Cal. 132; 8 Pac. Rep. 691. On an appeal to the district court, from a judgment of the probate court, refusing to admit a will to probate, the district court may, in its discretion, make an order for a trial by jury of any or all of the material facts arising upon the issues between the parties: *Cartwright v. Holcomb* (Okl.), 97 Pac. Rep. 385. Upon a trial de novo, in the district court, of a cause appealed from the judgment of a probate court, refusing to admit a will to probate on the ground that the will was forged, it is not error for the district court to require the appellant to make a prima facie showing entitling the will to probate, if it appears from the record that the burden of proof was cast upon the appellees to show that the will was forged: *Cartwright v. Holcomb* (Okl.), 97 Pac. Rep. 385.

6. Non-appealable orders.

(1) **Non-appealable orders. In general.** The following orders are non-appealable: An order appointing a special administrator: *Estate of Carpenter*, 73 Cal. 202, 203; 14 Pac. Rep. 677; an order vacating an order substituting a trustee: *Estate of Moore*, 86 Cal. 58, 59; 24 Pac. Rep. 816; an order of the probate court discharging an attachment: *Ferdinand Westheimer & Sons v. Hahn*, 15 Okl. 49; 78 Pac. Rep. 378; an order refusing to quash an execution: *Blum v. Brownstone*, 50 Cal. 293; an order rejecting a claim against an estate: *Wilkins v. Wilkins*, 1 Wash. 87; 23 Pac. Rep. 411, 412; an order to compel the clerk of the court to pay over certain moneys out of the estate of a deceased person: *Estate of Poten*, 72 Cal. 576; 14 Pac. Rep. 209; an order setting aside an order appointing a guardian ad litem for an incompetent person: *Estate of Hathaway*, 111 Cal. 270, 271; 43 Pac. Rep. 754; an order dismissing a petition to be allowed an attorney's fee for services rendered to an estate, where the matter

is pending before the court, and there has been no final determination of the attorney's claim: *Nash v. Wakefield*, 30 Wash. 556; 71 Pac. Rep. 35, 37; an order setting aside an order made, ex parte and without notice, in a case where notice should have been given because of allegations of fraud: *In re Sinclaire's Estate*, 44 Wash. 119; 86 Pac. Rep. 1117; and an order denying a motion to vacate an order denying the petition of an executor for an allowance of compensation for extraordinary services, and to restore the case to the calendar: *Estate of Walkerly*, 94 Cal. 352, 353; 29 Pac. Rep. 719. No appeal can be taken from an order dismissing a petition to compel an executor to return money from the estate paid by the petitioner to said executor as an advanced bid, where the order of confirmation of the sale to the petitioner was reversed, and the land was legally sold to another, as the petitioner has no debt or claim against the estate. His remedy is an individual action against the executor: *Estate of Williams (Cal.)*, 32 Pac. Rep. 241, 243.

(2) Non-appealable orders. Directions. Command. Contempt. The following orders are non-appealable: An order directing an administrator to turn over to his successor, upon resignation or removal, property belonging to the estate, or which has come into his hands as such representative: *In re Barker's Estate*, 26 Mont. 279; 67 Pac. Rep. 941, 943; an order commanding the dismissal of an action against the executor of an estate of the decedent and another, and directing the discharge of an administrator, upon and after the settlement of an account not yet filed: *Estate of Bullock*, 75 Cal. 419, 421; 17 Pac. Rep. 540; and an order ordering an administrator to allow his name to be used by a creditor of the estate, in a suit to set aside a conveyance of the decedent, as having been made to defraud his creditors: *Estate of Ohm*, 82 Cal. 160, 161; 22 Pac. Rep. 927. An appeal will not lie to the supreme court, from a judgment finding an executrix guilty of contempt in failing and refusing to pay over money to the assignee of a distributee as ordered by the court: *Estate of Wittmeier*, 118 Cal. 255; 50 Pac. Rep. 393, 394.

(3) Non-appealable orders. Revocation of letters. An order denying a petition for the revocation of letters of administration is non-appealable: *Estate of Montgomery*, 55 Cal. 210; *Estate of Keane*, 56 Cal. 407; *Estate of Moore*, 68 Cal. 394, 395; 9 Pac. Rep. 315. The Kansas statute makes no provision for an appeal to the district court from an order of the probate court refusing, upon application, to revoke letters testamentary or of administration: *Graves v. Bond*, 70 Kan. 464; 78 Pac. Rep. 851.

(4) Non-appealable orders. Accounts. The following orders are non-appealable: An order setting aside an order allowing the annual

account of an executor: Estate of Dunne, 53 Cal. 631, 632; an order refusing to set aside an order of distribution and settling an executor's final account: Lutz v. Christy, 67 Cal. 457; 8 Pac. Rep. 39; but see *Kerr's Cyc. Code Civ. Proc.*, § 963, subd. 3; an order setting aside a decree settling the final account of an executor: Estate of Cahalan, 70 Cal. 604; 12 Pac. Rep. 427; an order setting aside a decree settling an executor's final account and vacating a decree of distribution: Estate of Dean, 62 Cal. 613; and an order vacating a prior order settling the final account of a representative of the decedent: Estate of Hickey, 121 Cal. 378; 53 Pac. Rep. 818.

(5) **Non-appealable orders. Distribution.** The following orders are non-appealable: An order vacating a decree of distribution: Estate of Cahalan, 60 Cal. 232, 233; an order vacating a decree of final distribution: Estate of Murphy, 128 Cal. 339, 340; 66 Pac. Rep. 930, referring to former cases; an order refusing to vacate a decree of distribution: Estate of Wiard, 83 Cal. 619; 24 Pac. Rep. 45; an order refusing to vacate a decree of distribution of a decedent's estate, made by a district court in Montana: *In re Kelly's Estate*, 31 Mont. 356; 79 Pac. Rep. 244; an order requiring the distributee of an estate to restore property received by him under a final decree of distribution: *Iverson v. Superior Court*, 115 Cal. 27, 28; 46 Pac. Rep. 817; an order refusing to postpone a decree of final distribution: Estate of Burdick, 112 Cal. 387, 396; 44 Pac. Rep. 734; and an order denying the petition of a wife to vacate an order of distribution and discharge of executors, where she was, prior to her husband's decease, living separate and apart from him under an agreement, and enjoying the benefit of money paid for her support during such separation, although her petition informs the court that a large part of the estate had been concealed and withheld from administration: Estate of Noah, 88 Cal. 468, 472; 26 Pac. Rep. 361.

(6) **Non-appealable orders. Sales of property.** The following orders are non-appealable: An order refusing to set aside an order for the sale of the property of an estate previously made: Estate of Smith, 51 Cal. 563, 565; an order requiring an administrator to proceed with a sale as directed in a previous order: *Stuttmeister v. Superior Court*, 71 Cal. 322, 324; 12 Pac. Rep. 270; and an order denying and dismissing a petition for an order that an executor of an estate return to the petitioner the purchase-money paid for the interest of the testator, in certain real estate, in pursuance of an order of the court confirming the sale of such real estate: Estate of Williams (Cal.), 32 Pac. Rep. 241.

(7) **Non-appealable orders. Homesteads.** The following orders are non-appealable: An order refusing to vacate an order setting apart

a homestead to the widow of decedent: *Estate of Cahill*, 142 Cal. 628, 629; 76 Pac. Rep. 383; and an order of a probate court setting aside its own proceedings had before a final order upon the petition of a surviving wife to have a homestead set aside to her: *Estate of Johnson v. Tyson*, 45 Cal. 257, 259.

(8) **Non-appealable orders. Probate of wills.** Prior to 1901, section 963, subdivision 3, of the Code of Civil Procedure, did not authorize an appeal from an order or judgment refusing to revoke the probate of a will: *Estate of Hughston*, 133 Cal. 321, 322; 65 Pac. Rep. 742, 1039; *Estate of Winslow*, 128 Cal. 311; 60 Pac. Rep. 931. See *Hartmann v. Smith*, 140 Cal. 461, 467; 74 Pac. Rep. 7; *Estate of Scarboro*, 70 Cal. 147, 149; 11 Pac. Rep. 563. But see head-line 5, subd. (9), ante. A judgment refusing to admit a will to probate was not appealable before the amendment of the statute: *Estate of Smith*, 98 Cal. 636; 33 Pac. Rep. 744; *Peralta v. Castro*, 15 Cal. 511. But see head-line 5, subd. (9), ante. An order revoking an order refusing to admit a will to probate is not appealable: *Estate of Bouyssou*, 1 Cal. App. 657; 82 Pac. Rep. 1066, 1067.

7. Notice of appeal.

(1) **Sufficiency of.** A notice of appeal, "from all orders and decisions" made by a probate court on a certain day, is sufficient to cover any appealable order made on that day: *Estate of Pacheco*, 29 Cal. 224, 226. A notice of appeal in a probate proceeding is sufficient, though it does not state the court to which the appeal is taken, where there is but one court to which the appeal could be taken, and the objection is made in that court: *Starkweather v. Bell*, 12 S. D. 146; 80 N. W. Rep. 183, 185. There seems to be no reason why a notice of more than one appeal, in a probate proceeding, may not be in one and the same paper, where the matters appealed from are so designated that it can be seen from what the appeal is taken: *In re Dewar's Estate*, 10 Mont. 422; 25 Pac. Rep. 1025; *Estate of Wright*, 49 Cal. 550.

(2) **Service. Jurisdiction. Death of adverse party.** In Oregon, an appeal may be taken by serving a notice thereof on such adverse party or parties as have appeared in the action or suit: *In re Mendenhall's Will*, 43 Or. 542; 72 Pac. Rep. 318, 319. Serving notice of appeal upon all parties who appeared at the contest of the probate of a will, including an attorney for absent heirs and creditors not otherwise represented, gives jurisdiction to hear an appeal from an order admitting such will to probate: *Estate of Scott*, 124 Cal. 671, 674; 57 Pac. Rep. 654. Notice of motion for a new trial, or notice of appeal, need not be served upon one who is not an adverse party; as where a co-executor of the will of a husband was made defendant,

because he refused to join as co-plaintiff, and who denied the interest of the husband, but against whom no relief was granted, and who was not mentioned in the judgment for plaintiff: *Sprague v. Walton*, 145 Cal. 228; 78 Pac. Rep. 645. The necessity of serving a notice of appeal upon a respondent who is an adverse party is not obviated by the death of such party. The appellant must, within the time allowed for taking an appeal, serve his notice of appeal upon all adverse parties. If any of said parties have died, service must be made upon the personal representatives of the decedent, and if the appellant is unable to procure the appointment of a personal representative, and to serve such representative within the required time, his appeal is lost. An "adverse party" is one "whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken": *Bell v. San Francisco Sav. Union (Cal.)*, 94 Pac. Rep. 225, 227.

(3) **Filing of notice and undertaking. Jurisdiction.** A notice of appeal and undertaking having been filed within the proper time, the appellate court has jurisdiction of the cause, and whether or not it will dismiss the appeal, for defects in the undertaking, lies within the discretion of the court, the exercise of which will not be disturbed where no abuse thereof is discovered: *Starkweather v. Bell*, 12 S. D. 146; 80 N. W. Rep. 183, 185. On appeal from the county court, in probate matters, to the circuit court, the notice of appeal and undertaking must be filed with the county judge, who has succeeded to the duties of the former probate judge: *Starkweather v. Bell*, 12 S. D. 146; 80 N. W. Rep. 183, 185. Where a notice of appeal and undertaking filed with the county judge have not been properly indorsed, there is no error, in proceedings of the circuit court, in allowing the county judge to indorse his filing upon the papers, nor in allowing the clerk of the county court to correct his filing indorsed upon such papers to correspond with the fact: *Starkweather v. Bell*, 12 S. D. 146; 80 N. W. Rep. 183, 185.

8. Undertaking on appeal.

(1) **In general.** When a defective undertaking on appeal is filed, the better practice, on the part of the appellate court, when the defects of the undertaking are called to its attention, is to require the appellant to file a new undertaking: *Starkweather v. Bell*, 12 S. D. 146; 80 N. W. Rep. 183, 185. A deposit of money, equal to the amount of the required undertaking, may be received in place of the undertaking upon appeal: *In re McVay's Estate (Ida.)*, 93 Pac. Rep. 28. In Idaho, where the probate court, in a probate matter, enters one judgment and includes therein more than one order, and the appeal is taken from the judgment, only one bond or one deposit

of one hundred dollars under the statute is required: *In re McVay's Estate* (Ida.), 93 Pac. Rep. 28, 29. If an appeal is taken to the district court from the probate court, and the probate court fails to transmit to the district court the undertaking on appeal, or the deposit in lieu thereof, the district court may, when it is so made to appear, direct the probate court to transmit such undertaking or deposit to the district court: *In re McVay's Estate* (Ida.), 93 Pac. Rep. 28, 29. An undertaking on appeal stays proceedings upon the order appealed from: *Pennie v. Superior Court*, 89 Cal. 31, 33; 26 Pac. Rep. 617; *Estate of Schedel*, 69 Cal. 241; 10 Pac. Rep. 334.

(2) **Application of statute. Official bond.** The statute which permits the official bond of an executor, administrator, or guardian to stand in place of an undertaking on appeal applies only to a case in which the appellant was a representative at the time of taking the appeal. It does not apply to a case where the appealing party is not an executor, administrator, or guardian. The covenants of an administrator's bond do not make it, on its face, an undertaking on appeal. It becomes such under certain circumstances, only by virtue of the provisions of the statute. It follows that sureties on the bond of a representative are not answerable, unless the case falls strictly within the terms of the statute: *Estate of McDermott*, 127 Cal. 450, 452; 59 Pac. Rep. 783. The statute which provides that executors, who have given an official bond, may rely upon such a bond on appeal from orders and judgments of the superior court, in matters pertaining to the estate, etc., does not apply where there is nothing in the record to show that the defendant executor has given any official bond, and where the appeal is not one from an order made in "proceedings had upon the estate": *Pacific Pac. Co. v. Bolton*, 89 Cal. 154, 155; 26 Pac. Rep. 650.

(3) **Bond by representative. When not required.** If an executor or administrator, who has given an official bond, appeals from a judgment and proceedings had relative to the estate, it is not necessary for him to file a bond. His bond as a representative stands in the place of an undertaking on appeal, not only for the purpose of perfecting the appeal, but also to stay proceedings upon the order appealed from: *Estate of Corwin*, 61 Cal. 160, 163; *Erlanger v. Danielson*, 88 Cal. 480; 26 Pac. Rep. 505, 506; *Ex parte Orford*, 102 Cal. 656, 657; 36 Pac. Rep. 928. Executors, administrators, or guardians who have given bonds in this state, with sureties, according to law, are not required to give an undertaking on appeal or proceedings in error: *Freeman v. Hill*, 45 Kan. 435; 25 Pac. Rep. 870.

(4) **Bond by representative. When required.** If an executor or administrator appeals in a personal matter, and not one in which

the estate is interested, it is necessary for him to give a bond; as where he appeals from an order revoking his letters: *Estate of Danielson*, 88 Cal. 480, sub. nom. *Erlanger v. Danielson*, 26 Pac. Rep. 505, 506. If the executor of a deceased heir appeals, in that character, from an order distributing a portion of the estate to a legatee, it is necessary for him to give an appeal bond, because the appeal is not an appeal from an order made in the proceeding for the settlement of the estate of which the appellant is executor: *Estate of Skerrett*, 80 Cal. 62, 63; 22 Pac. Rep. 85. If an administrator has been removed, and the court subsequently, upon the settlement of his account, renders judgment against him for a balance due the estate, he must, if he appeals, give an appeal bond, because the appeal is from a personal judgment not prosecuted for the estate, but for his own interest. It is not a probate matter, but an individual matter: *Fuller v. Fuller's Estate*, 7 Col. App. 555; 44 Pac. Rep. 72, 73. Where letters of administration are issued without jurisdiction, and the probate court, upon the hearing, determines and orders that they be declared null and void, the person illegally appointed as administrator is not entitled to appeal from such order without giving the appeal bond required from ordinary appellants: *Mallory v. Burlington etc. R. R. Co.*, 53 Kan. 537; 36 Pac. Rep. 1059. An administrator may appeal from an order revoking his letters, but is not entitled to a stay of proceedings without giving a bond: *In re Henriques*, 5 N. M. 169; 21 Pac. Rep. 80, 82.

9. Jurisdiction of appeal. An appellate court will not entertain jurisdiction of an appeal from an order refusing to revoke an appealable order: *Guardianship of Get Young*, 90 Cal. 77, 78; 27 Pac. Rep. 158. In case of a premature appeal, the appellate court acquires no jurisdiction of the subject-matter: *Estate of Devincenzi*, 131 Cal. 452, 453; 63 Pac. Rep. 723. The appellate court is without jurisdiction to hear an appeal where all adverse parties have not been served with notice of appeal: *Estate of Scott*, 124 Cal. 671, 674; 57 Pac. Rep. 654. If the probate court removes a guardian, and appoints another one in his stead, the latter is a necessary party on an appeal by the former from such order: *Estate of Medbury*, 48 Cal. 83, 84.

10. Premature appeal.

(1) Dismissal of. An appeal taken, before a probate order, decree, or judgment is entered at length in the minute-book of the court, is premature and will be dismissed because the appellate court has no jurisdiction thereof: *Estate of Devincenzi*, 131 Cal. 452; 63 Pac. Rep. 723; *Estate of Scott*, 124 Cal. 671; 57 Pac. Rep. 654; *Estate of Sheid*, 122 Cal. 528; 55 Pac. Rep. 328; *Estate of Pearsons*, 119 Cal. 27; 50 Pac. Rep. 929; *Home for Inebriates v. Kaplan*, 84 Cal. 486; 24 Pac. Rep. 119; *Estate of Rose*, 80 Cal. 166, 168, 171; *Estate of*

Rose, 72 Cal. 577; 14 Pac. Rep. 369. The dismissal of a premature appeal does not operate as an affirmance of the judgment; and, as such appeal is absolutely void, it does not deprive the lower court of jurisdiction, and no stay of proceeding is effected thereby: Estate of Kennedy, 129 Cal. 384, 385; 62 Pac. Rep. 64. The dismissal of an appeal, as having been taken prematurely, does not operate to exonerate the bondsmen on the undertaking given as required by law to make the appeal effectual. The sureties, under such an undertaking, agree to be liable if the appeal be dismissed, and, as the respondent must be at some expense to have even a void appeal disposed of, there is a consideration for the undertaking: Estate of Kennedy, 129 Cal. 384, 385; 62 Pac. Rep. 64. The dismissal of a premature appeal is not a bar to a second appeal, in the same case, when a record shall have made up from which an appeal can be taken: Estate of Rose, 80 Cal. 166, 171; 22 Pac. Rep. 86.

(2) **Entry of order. What constitutes.** A probate order, decree, or judgment, is not "entered" until it is "entered at length in the minute-book of the court," as provided by the statute: Estate of Pearson, 119 Cal. 27, 28; 50 Pac. Rep. 929. See § 808, ante. An entry, in the clerk's register of actions, noting an entry of the decree in the minutes, but which had no reference to the fact of the entering of the decree at length in the minute-book, and was not intended to record that fact, is not an entry "at length in the minute-book of the court": Estate of Pearsons, 119 Cal. 27, 29; 50 Pac. Rep. 929. The time for an appeal from a probate order begins to run only from the date of the actual entry of the order at length in the records of the court, and is determined by the statute,—not by the stipulation of the parties: Estate of Scott, 124 Cal. 671, 675; 57 Pac. Rep. 654.

11. **Dismissal of appeal.** An appeal from a non-appealable order will be dismissed by the appellate court, of its own motion, and without objection from the respondent: Estate of Wiard, 83 Cal. 619; 24 Pac. Rep. 45. An appeal will be dismissed, where no undertaking on appeal is filed, although it appears from the transcript that an order was made dispensing with security on appeal: Estate of Danielson, 88 Cal. 480, 481; 26 Pac. Rep. 505. An appeal from an order in a probate proceeding will be dismissed for want of diligence in prosecuting the appeal where it appears that, before the filing of the transcript, the official records were destroyed by fire, but that no effort was made for almost two years afterwards to restore the same: Estate of Heywood (Cal.), 97 Pac. Rep. 825, 827. If an appeal from an order of the probate court rests on a statement of facts alone, there being no judgment roll, it must be dismissed, where no statement is made of the grounds of appeal. The appellant must

state, specifically, the particular errors or grounds upon which he intends to rely on the appeal: *Estate of Boyd*, 25 Cal. 511, 515. It is no ground for the dismissal of an appeal, that a defendant administrator, in whose favor a judgment was rendered in the trial court, has been convicted of embezzlement, where that question is raised for the first time on appeal: *Brown v. Mann* (Cal.), 9 Pac. Rep. 549, 550. In cases where a motion for a new trial may be made, an appeal will not be dismissed, on motion, because the proper procedure has not been observed. The proper motion, in such a case, is for an affirmance of the order: *In re Davis' Estate*, 27 Mont. 235; 70 Pac. Rep. 721, 724.

REFERENCES.

Dismissal of premature appeal: See head-line 10, subd. (1), *supra*.

12. Statement. Bill of exceptions. Judgment roll. On appeal from a judgment, adjudging that certain persons are entitled to share in the estate of a testator, and from an order denying a new trial of the issues, where there is no substantial conflict in the evidence, and only questions of law are raised, the supreme court may act upon the record as upon an agreed statement of facts, where counsel have invited it to do so in their respective briefs: *In re Klein's Estate*, 35 Mont. 185; 88 Pac. Rep. 798, 801. The appellate court will not review the evidence, in a proceeding in the probate court, unless it is embodied in a statement on appeal: *Estate of Arnaz*, 45 Cal. 259, 260. The appellate court will not review an order revoking the letters of appellant, in the absence of a statement of facts or bill of exceptions: *In re Farnham's Estate*, 41 Wash. 570; 84 Pac. Rep. 602, 603. On appeal from a determination in a probate proceeding, there can be no review, if the record does not contain any of the evidence as to the matters in controversy: *In re Reed's Estate*, 28 Utah, 465; 79 Pac. Rep. 1049, 1050. There is no such thing, technically, as a judgment roll in probate proceedings; but, on an appeal from an order settling and allowing the account of an administrator, the record before the court, consisting of the account, the written objections thereto, and the findings and order, certified by the clerk as the judgment roll, with a certified copy of the notice of appeal, will constitute the judgment roll. Other matters, not forming part of the judgment roll, in such cases, should be incorporated in a bill of exceptions, or statement, as the case may be, following the analogies of provisions regulating records on appeal from judgments in ordinary actions: *In re Dougherty's Estate*, 34 Mont. 336; 86 Pac. Rep. 38, 39, 40.

13. Consideration on appeal.

(1) **In general.** Errors complained of on appeal will be disregarded, where no objection was made to them in the lower court: *Gillett v.*

Chavez, 12 N. M. 353; 78 Pac. Rep. 68, 69. The objection, that a judgment is not authorized by law, cannot be considered on appeal from an order denying a motion for a new trial: Estate of Westfield, 96 Cal. 113, 115; 30 Pac. Rep. 1104. In the absence of a plain abuse of discretion, the action of the probate court, in removing an administrator, will not be disturbed on appeal: Estate of Baldrige, 2 Ariz. 299; 15 Pac. Rep. 141, 143. If a probate court makes an erroneous order settling the accounts of an executor or administrator, or errs in directing distribution, an appeal may be taken, and, on such appeal, the error, if any, as to striking out the objections to the final account and the petition for distribution, may be considered: State v. District Court, 34 Mont. 303; 87 Pac. Rep. 614, 615. If a complaint, in a probate matter, is insufficient upon any ground properly specified in the demurrer thereto, the order sustaining the demurrer must be upheld on appeal, although the lower court may have considered it sufficient, in that respect, and may have, in its order, declared it defective only in some particulars in which the appellate court holds it to be good: Burke v. Maguire (Cal.), 98 Pac. Rep. 21, 23. If checks returned by an administrator appear to have been signed by him as such, and are offered and received in evidence, as vouchers for some of the disbursements, without objection, complaint cannot be made, on a writ of error, that the checks are not proper vouchers: Rice v. Tilton, 14 Wyo. 101; 82 Pac. Rep. 577, 581.

REFERENCES.

Necessity of statement or bill of exceptions: See head-line 12, *supra*.

(2) **Review of discretion.** An appellate court will not, on appeal from an order revoking letters of administration issued to a creditor of the deceased, review the discretion of the lower court in appointing a successor: In re Farnham's Estate, 41 Wash. 570; 84 Pac. Rep. 602, 603. An attorney may be appointed, in the discretion of the court, for minor heirs in probate proceedings; and though the court abused its discretion in granting a motion to vacate such an order, that is not acting without jurisdiction, or in excess of jurisdiction. If the court errs in granting such a motion its action is not reviewable on a writ of review: State v. District Court (Mont.), 87 Pac. Rep. 615.

(3) **Presumptions.** On appeal from an order of the probate court, if there is no bill of exceptions showing the evidence, the appellate court must take the findings of fact as absolutely true, and presume that the evidence necessary to sustain them was presented to the court below: Estate of Brown, 143 Cal. 450; 77 Pac. Rep. 160, 162. On appeal from an order revoking letters testamentary and settling the semi-annual account of an administrator, it is to be presumed, on

appeal, that, upon final settlement of the estate, the proper compensation will be allowed to all the executors and administrator who have taken or may take any part in the administration of the estate, and that, if anything is due to the removed administrator, the court will make the proper award to him: *In re Courtney*, 31 Mont. 625; 79 Pac. Rep. 317, 319.

14. **Law of the case.** If a case has been appealed several times, and the facts and evidence are the same as on the first trial, with immaterial exceptions, the decision upon the first appeal becomes the law of the case upon subsequent appeals: *Snyder v. Jack*, 140 Cal. 584, 585; 74 Pac. Rep. 139, 355; *Estate of Pacheco*, 29 Cal. 224. The decision of the supreme court, in an action under a statute providing for the distribution of the estate of a decedent, either on appeal from a part of the judgment, denying a motion to affirm an order of the district court denying a motion for a new trial, or denying a motion to dismiss an appeal from a part of the judgment, is the law of the case on the questions made by such motions: *In re Klein*, 35 Mont. 185; 88 Pac. Rep. 798, 801.

15. **Certiorari.** An appealable order cannot be reviewed on a writ of certiorari: *Estate of McConnell*, 74 Cal. 217, 219; 15 Pac. Rep. 746, either before or after the expiration of the time allowed by law for an appeal therefrom: *Stuttmeister v. Superior Court*, 71 Cal. 322; 323; 12 Pac. Rep. 270. On appeal from a decree removing an administrator, the sufficiency of the evidence to justify such action on the part of the court, is not reviewable on a writ of certiorari, if the evidence is not set forth in the petition: *In re Henriques*, 5 N. M. 169; 21 Pac. Rep. 80.

16. **Writ of error.** The Colorado statute provides that, if the court does not have jurisdiction to entertain an appeal, but would have, had the action come up on writ of error, the appeal shall be dismissed, and the cause re-docketed on error: *New York Life Ins. Co. v. Brown*, 32 Col. 365; 76 Pac. Rep. 799, 801. In Colorado, a proceeding to sell a decedent's lands, to pay debts of his estate, may be reviewed on error: *New York Life Ins. Co. v. Brown*, 32 Col. 365; 76 Pac. Rep. 799, 802. In Arizona, a writ of error to review a judgment against a deceased person must be prosecuted in the name of the personal representative of decedent: *Smith v. Stilwell (Ariz.)*, 80 Pac. Rep. 333. In Arizona, a writ of error to review a judgment against a deceased person will be dismissed, if the plaintiff in error fails to file abstracts and briefs as required by the rules of court, or where he fails to make the personal representative of the defendant, in the judgment sought to be reviewed, a party to the writ: *Smith v. Stilwell (Ariz.)*, 80 Pac. Rep. 333.

17. To circuit, or district court.

(1) **Trial de novo.** The statute of Idaho provides that an appeal may be taken from the probate court in probate matters. "The appeal may be taken either upon questions of both law and fact. If taken upon questions of law alone, the district court may review any such question which sufficiently appears upon the face of the record or proceeding without the aid of a bill of exception, but no bill of exceptions shall be allowed or granted in the probate court in probate matters. If the appeal be upon questions of both law and fact, the trial in the district court shall be de novo": See Act of March 11, 1903 (Sess. Laws 1903, p. 373). And "it must be assumed," said Stewart, J., on rehearing in the case of *In re McVay's Estate* (Ida.), 93 Pac. Rep. 28, 32, that the legislature, when it passed this statute, "was acting within the purview of the constitution, and did not intend to go any further than to provide for the exercise of the 'appellate jurisdiction' of the district court." Proceeding upon that assumption, the learned justice showed that a trial 'de novo' on appeal requires 'that appeals be tried upon the original papers and upon the same issues had below'; and that amendments should not be allowed in the district court on appeal from the probate court in a probate matter. He said that, "the very expression, 'appellate jurisdiction,' refutes and contradicts any idea of filing new pleadings, and framing and settling issues in a court of such jurisdiction. The amendments of pleadings and filing new pleadings and joining issues suggest at once to the practitioner a court of 'original jurisdiction' as the forum in which such practice and procedure is taking place. It is a practice and procedure not usually or ordinarily invoked or countenanced in courts exercising only appellate jurisdiction, and we are not prepared to believe that the framers of the constitution ever intended to use the phrase (appellate jurisdiction) in any uncommon, unusual, or extraordinary sense. 'Appellate jurisdiction,' as used in section 20 of the constitution, is the direct antithesis of the words 'original jurisdiction' in the same section." "If the appeal," said he, "is taken upon questions of law alone, the district court will review such questions of law as were raised in the probate court upon the record, but will not permit any new questions of law to be raised. If the district court sustains the appellant's views, then the judgment will be reversed, and the probate court directed to proceed accordingly. If, however, the district court affirms the judgment of the probate court, then the same is certified back to the probate court with the decision thereon. If the appeal be taken upon questions of both law and fact, then the district court proceeds to try, first, the questions of law, and, if the cause is reversed on questions of law, the questions of fact are not tried. If, however, the cause is not reversed on questions of law, then the same questions of fact as were tried in the probate court will be retried in the district court as other trials in said court are conducted. Witnesses may be called and may testify the

same as in the trial of any other cause. In other words, this statute, under the constitution, grants to the district court appellate jurisdiction to retry only the same issues of law and fact as were heard and determined by the probate court": *In re McVay's Estate* (Ida.), 93 Pac. Rep. 28, 32. Though the statute provides that, on appeal from the county court to the circuit court in probate cases, "on questions of both law and fact, the trial must be de novo," yet the only issues that can be tried, on such appeal, are those presented by the record in the county court and passed upon by that court: *In re Skelly's Estate* (S. D.), 113 N. W. Rep. 91, 93. If an appeal is taken to the circuit court from a county court's order appointing an administrator, and it is stipulated between counsel for the respective parties that such order of the county court may be affirmed, and the circuit court, through mistake or inadvertence, includes in its order affirming the order appealed from, matters which were not before the county court, the circuit court may afterwards set aside its order of affirmance and enter a new one; and in so doing is justified in regarding the stipulation as still in force, and need not order a trial de novo: *In re Skelly's Estate* (S. D.), 113 N. W. Rep. 91, 94.

(2) **Findings.** Where, on appeal from the county court to the circuit court, the order of the county court appointing an administrator is affirmed by the circuit court, no findings are necessary on which to base such judgment: *In re Skelly's Estate* (S. D.), 113 N. W. Rep. 91, 94.

(3) **Correction, and execution of judgment.** If, on appeal to the circuit court from a county court's order appointing an administrator, in a case where a number of parties, claiming to be the heirs to the estate, had filed petitions in the county court, and were proceeding to establish their claims as heirs of said estate, the circuit court, in affirming the order of the county court, by mistake or inadvertence, includes matters as to heirship and final distribution, which were not before the county court, and the claimants all join in an application for an order to show cause why such judgment of affirmance should not be vacated, set aside, and corrected, so that they can properly present their claims as such heirs, this showing is sufficient to authorize the circuit court to correct the judgment appearing to have been made by it, determining who were such heirs, when, in fact, it had rendered no such judgment: *In re Skelly's Estate* (S. D.), 113 N. W. Rep. 91, 94. If, on appeal from a county court to a circuit court, from an order of the county court directing that letters of administration issue to a person named, the circuit court, through mistake or inadvertence, includes in its order of affirmance matters which were not before the county court, such judgment may be corrected on motion made within the time prescribed by the statute pro-

viding for the relief of a party from a judgment or order taken against him through his mistake, inadvertence, etc., by entering a new order vacating such order, and rendering the judgment intended to be rendered on the appeal from the order of the county court: *In re Skelly's Estate* (S. D.), 113 N. W. Rep. 91, 93. If, on appeal to the circuit court, from a county court's order appointing an administrator, the judgment of affirmance, through mistake or inadvertence, includes matters which were not before the county court, the circuit court, on vacating its order of affirmance, may enter a new order of affirmance, *nunc pro tunc*, where no rights of third parties are affected by entering the corrected judgment, as of the date of the original but erroneous one: *In re Skelly's Estate* (S. D.), 113 N. W. Rep. 91, 94. A judgment entered in the district court, in a probate matter, on appeal from the probate court, is to be executed by the district court certifying such judgment to the probate court, with direction to execute the same in accordance with the terms thereof: *In re McVay's Estate* (Ida.), 93 Pac. Rep. 28, 29.

PART XXI.
VARIOUS PROVISIONS OF THE CODES, AND
MISCELLANEOUS FORMS.

CHAPTER I.

MISCELLANEOUS PROVISIONS AND FORMS.

- § 1065. Who may own property.
- § 1066. Minors, who are.
- § 1067. Legitimacy of children born in wedlock.
- § 1068. Who may dispute legitimacy of child.
- § 1069. Posthumous children.
- § 1070. Children born after dissolution of marriage.
- § 1071. Children of annulled marriage.
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- § 1073. Other directions, when void in part.
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- § 1076. Guardian, how appointed.
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- § 1078. Suspending power of alienation.
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- § 1084. Purchase by trustee of claims against trust fund.
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- § 1086. Trustee's influence not to be used for his advantage.
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- § 1088. Effect of will upon gift.
- § 1089. Service by mail, how made.
- § 1090. What is evidence of publication.
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- § 1092. Presumption as to survivorship.
- § 1093. Persons who cannot testify.
- § 1094. Form. Acknowledgement by corporation.
- § 1095. Form. Affidavit of posting notice.

- § 1096. Form. Appointment of special commissioner to take depositions.
- § 1097. Form. Subpœna.
- § 1098. Form. Summons. (Trustee as plaintiff.)
- § 1099. Form. Summons. (Executor as plaintiff.)
- § 1100. Form. Order of reference to court commissioner to examine and report on qualifications of sureties.
- § 1101. Form. Description of property. (In general.)
- § 1102. Form. Brief description of parcels.
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- § 1104. Form. Order requiring notice of application for restoration of records, and of the setting of said application for hearing.
- § 1105. Form. Notice of application to restore destroyed records, by order of court, and of time and place fixed for hearing. (Case of entire destruction.)
- § 1106. Form. Notice of application to restore destroyed records, by order of court, and of time and place fixed for hearing. (Case of partial destruction.)
- § 1107. Form. Complaint to cancel, annul, and set aside deeds, with prayer for an accounting and an injunction, and for the appointment of a receiver. (In action brought by heirs against widow, both as an individual and as special administratrix.)

TESTIMONY OF PARTIES, OR PERSONS INTERESTED, FOR OR AGAINST
REPRESENTATIVES, SURVIVORS, OR SUCCESSORS IN TITLE OR
INTEREST OF PERSONS DECEASED OR INCOMPETENT.

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| <ul style="list-style-type: none"> 1. Application of statute. <ul style="list-style-type: none"> (1) In general. California statute. (2) Same. Statutes of other states. (3) Equal footing, and equal balance of disadvantages. (4) Meaning of terms. 2. Particular matters to which statute does not apply. <ul style="list-style-type: none"> (1) In general. (2) Claim in favor of estate. (3) Controversies as to relative rights of heirs or devisees. (4) Actions to quiet title. 3. Who are competent. <ul style="list-style-type: none"> (1) In general. (2) Parties not interested. (3) Party may testify to what in general. (4) Party may testify to what in particular. | <ul style="list-style-type: none"> (5) Employees, clerks, agents, etc. (6) Officers and stockholders of corporations. (7) Widow of deceased. (8) Competency in other particular instances. 4. Who are incompetent. <ul style="list-style-type: none"> (1) In general. (2) Parties cannot testify to what in general. (3) Parties cannot testify to what in particular. (4) Partnership affairs, in general. (5) Action by or against surviving partner. (6) Action on note indorsed to partnership. (7) Physician's services to deceased. (8) Fraud. |
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|--|--|
| (9) Gifts. | (12) Contest of will, or of its probate. |
| (10) Promissory notes. | (13) Incompetency in other particular instances. |
| (11) Establishment or enforcement of trusts. | |

§ 1065. **Who may own property.** Any person, whether citizen or alien, may take, hold, and dispose of property, real or personal, within this state. **Kerr's Cyc. Civ. Code, § 671.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho. Civ. Code 1901, secs. 2354, 2355.
Kansas. Gen. Stats. 1905, § 99.
Nevada. Comp. Laws, sec. 2725.
New Mexico. Comp. Laws 1897, sec. 3936.
North Dakota.* Rev. Codes 1905, § 4713.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5391.
South Dakota.* Civ. Code 1904, § 193.
Washington. Pierce's Code, § 3162.
Wyoming. Const. Art. 1, sec. 29.

§ 1066. **Minors, who are.** Minors are: 1. Males under twenty-one years of age; 2. Females under eighteen years of age. **Kerr's Cyc. Civ. Code, § 25.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 34, p. 362; sec. 35, p. 363.
Colorado. 3 Mills's Ann. Stats., sec. 4699.
Idaho.* Civ. Code 1901, sec. 1981.
Kansas. Gen. Stats. 1905, § 4374.
Montana.* Civ. Code, sec. 10.
Nevada. Comp. Laws, sec. 5000.
North Dakota. Rev. Codes 1905, § 4010.
Oklahoma. Rev. Stats. 1903, sec. 3907.
Oregon. Bellinger and Cotton's Ann. Codes and Stats., § 5330.
South Dakota. Civ. Code 1904, § 10.
Utah. Rev. Stats. 1898, sec. 1541.
Washington. Pierce's Code, § 3342.

§ 1067. **Legitimacy of children born in wedlock.** All children born in wedlock are presumed to be legitimate. **Kerr's Cyc. Civ. Code, § 193.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 280.
North Dakota.* Rev. Codes 1905, § 4088.

Oklahoma.* Rev. Stats. 1903, sec. 3760.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 787, 788.

South Dakota. Civ. Code 1904, § 107.

Wyoming. Rev. Stats. 1899, sec. 3005.

§ 1068. **Who may dispute legitimacy of child.** The presumption of legitimacy can be disputed only by the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact. **Kerr's Cyc. Civ. Code, § 195.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 282.

North Dakota.* Rev. Codes 1905, § 4090.

Oklahoma.* Rev. Stats. 1903, sec. 3762.

South Dakota.* Civ. Code 1904, § 109.

Wyoming. Rev. Stats. 1899, sec. 3005.

§ 1069. **Posthumous children.** When a future interest is limited to successors, heirs, issue, or children, posthumous children are entitled to take in the same manner as if living at the death of their parents. **Kerr's Cyc. Civ. Code, § 698.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Alaska. Carter's Code, sec. 181, p. 388.

Colorado. 3 Mills's Ann. Stats., sec. 4653.

Idaho.* Civ. Code 1901, sec. 2360.

Montana.* Civ. Code, sec. 1119.

Nevada. Comp. Laws, secs. 2683, 2684.

North Dakota.* Rev. Codes 1905, § 4733.

Oklahoma. Rev. Stats. 1903, sec. 3909.

South Dakota.* Civ. Code 1904, § 213.

§ 1070. **Children born after dissolution of marriage.** All children of a woman who has been married, born within ten months after the dissolution of the marriage, are presumed to be legitimate children of that marriage. **Kerr's Cyc. Civ. Code, § 194.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 281.

North Dakota. Rev. Codes 1905, § 4089.

Oklahoma. Rev. Stats. 1903, sec. 3761.

South Dakota. Civ. Code 1904, § 108.

Wyoming. Rev. Stats. 1899, sec. 3005.

§ 1071. **Children of annulled marriage.** A judgment of nullity of marriage does not affect the legitimacy of children begotten before the judgment. **Kerr's Cyc. Civ. Code,** § 84.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Colorado. 3 Mills's Ann. Stats., sec. 1562.

Idaho. Civ. Code 1901, sec. 2016.

Kansas. Gen. Stats. 1905, § 5591.

Montana. Civ. Code, sec. 112.

New Mexico. Comp. Laws 1897, sec. 1430.

North Dakota. Rev. Codes 1905, § 4045.

Oklahoma. Rev. Stats. 1903, sec. 4843.

South Dakota. Civ. Code 1904, § 63.

Wyoming. Rev. Stats. 1899, secs. 3006, 3007, 3008.

§ 1072. **Accumulation of income.** An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing sufficient to pass the property out of which the fund is to arise, as follows:

1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or,

2. If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority. **Kerr's Cyc. Civ. Code,** § 724.

§ 1073. **Other directions, when void in part.** If in either of the cases mentioned in the last section the direction for an accumulation is for a longer term than during the minor-

ity of the beneficiaries, the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority. **Kerr's Cyc. Civ. Code, § 725.**

§ 1074. Application of income to support, etc., of minor. When a minor for whose benefit an accumulation has been directed is destitute of other sufficient means of support and education, the proper court, upon application, may direct a suitable sum to be applied thereto out of the fund. **Kerr's Cyc. Civ. Code, § 726.**

§ 1075. Infant, etc., to appear by guardian. When an infant, or an insane or incompetent person is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending, in each case. A guardian ad litem may be appointed in any case, when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to represent the infant, insane, or incompetent person in the action or proceeding, notwithstanding he may have a general guardian and may have appeared by him. **Kerr's Cyc. Code Civ. Proc., § 372.**

§ 1076. Guardian, how appointed. When a guardian ad litem is appointed by the court, he must be appointed as follows:

1. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years, or if under that age, upon the application of a relative or friend of the infant.

2. When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, and apply within ten days after the service of the summons, or if under that age, or if he neglect so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action.

3. When an insane or incompetent person is a party to an action or proceeding, upon the application of a relative or

friend of such insane or incompetent person, or of any other party to the action or proceeding. **Kerr's Cyc. Code Civ. Proc.**, § 373.

§ 1077. **Powers of persons whose incapacity has been adjudged.** After his incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract, nor delegate any power or waive any right, until his restoration to capacity. But a certificate from the medical superintendent or resident physician of the insane asylum to which such person may have been committed, showing that such person had been discharged therefrom, cured and restored to reason, shall establish the presumption of legal capacity in such person from the time of such discharge. **Kerr's Cyc. Civ. Code**, § 40.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Civ. Code 1901, sec. 1988.

Montana.* Civ. Code, sec. 23.

North Dakota. Rev. Codes 1905, § 4020.

Oklahoma. Rev. Stats. 1903, sec. 3919.

South Dakota. Civ. Code 1904, § 22.

§ 1078. **Suspending power of alienation.** The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section seven hundred and seventy-two. **Kerr's Cyc. Civ. Code**, § 715.

§ 1079. **Tenure by which homestead is held.** From and after the time the declaration is filed for record, the premises therein described constitute a homestead. If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title; in other cases, upon the death of the person whose

property was selected as a homestead, it shall go to his heirs or devisees, subject to the power of the superior court to assign the same for a limited period to the family of the decedent; but in no case shall it be held liable for the debts of the owner, except as provided in this title. **Kerr's Cyc. Civ. Code, § 1265.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana. Civ. Code, sec. 1703.

Nevada. Comp. Laws, sec. 550.

North Dakota. Rev. Codes 1905, § 5071.

South Dakota. Pol. Code 1904, § 3232.

Washington.* Pierce's Code, § 5488.

Wyoming. Rev. Stats. 1899, sec. 4741.

§ 1080. **Qualities of expectant estates.** Future interests pass by succession, will, and transfer, in the same manner as present interests. **Kerr's Cyc. Civ. Code, § 699.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Civ. Code 1901, sec. 2353.

Montana.* Civ. Code, sec. 1120.

North Dakota.* Rev. Codes 1905, § 4734.

South Dakota.* Civ. Code 1904, § 214.

§ 1081. **Mere possibility is not an interest.** A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind. **Kerr's Cyc. Civ. Code, § 700.**

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Idaho.* Civ. Code 1901, sec. 2352.

Montana.* Civ. Code, sec. 1121.

North Dakota.* Rev. Codes 1905, § 4735.

South Dakota.* Civ. Code 1904, § 215.

§ 1082. **Contingent remainder in fee.** A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such

persons may be determined before they attain majority. **Kerr's Cyc. Civ. Code, § 772.**

§ 1083. Involuntary trust resulting from negligence, etc. One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it. **Kerr's Cyc. Civ. Code, § 2224.**

§ 1084. Purchase by trustee of claims against trust fund. A trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee; but he may be allowed, by any competent court, to charge to the trust property what he has in good faith paid for the claim, upon discharging the same. **Kerr's Cyc. Civ. Code, § 2263.**

§ 1085. Investment of money by trustee. A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same. **Kerr's Cyc. Civ. Code, § 2261.**

§ 1086. Trustee's influence not to be used for his advantage. A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary. **Kerr's Cyc. Civ. Code, § 2231.**

§ 1087. "Will" includes codicil. The word "will" includes codicil. **Kerr's Cyc. Civ. Code, § 14, subd. 5; Kerr's Cyc. Code Civ. Proc., § 17, subd. 5.**

ANALOGOUS AND IDENTICAL STATUTES.

No identical statute found.

Alaska. Carter's Code, sec. 181, p. 388; sec. 163, p. 384.

Colorado. 3 Mills's Ann. Stats., secs. 4662, 4815j.

Montana. Civ. Code, sec. 4662.

Nevada. Comp. Laws, sec. 3091.

North Dakota. Rev. Codes 1905, §§ 5182, 6890.

Oklahoma. Rev. Stats. 1903, sec. 6890.

Oregon. Bellinger and Cotton's Ann. Codes and Stats., §§ 5575, 5590.

South Dakota. Civ. Code 1904, § 1089.

Utah. Rev. Stats. 1898, sec. 2498.

Washington. Pierce's Code, §§ 2342, 2359, 2361.

§ 1088. **Effect of will upon gift.** A gift in view of death is not affected by a previous will; nor by a subsequent will, unless it expresses an intention to revoke the gift. **Kerr's Cyc. Civ. Code**, § 1152.

ANALOGOUS AND IDENTICAL STATUTES.

The * indicates identity.

Montana.* Civ. Code, sec. 1556.

North Dakota.* Rev. Codes 1905, § 4999.

South Dakota.* Civ. Code 1904, § 959.

§ 1089. **Service by mail, how made.** In case of service by mail, the notice or other paper must be deposited in the post-office, in a sealed envelope, addressed to the person on whom it is to be served, at his office or place of residence, and the postage paid.

The service is complete at the time of the deposit, but if, within a given number of days after such service, a right may be exercised, or an act is to be done by the adverse party, the time within which such right may be exercised or act be done, is extended one day for every twenty-five miles distance between the place of deposit and the place of address; such extension, however, not to exceed thirty days in all. **Kerr's Cyc. Code Civ. Proc. (Kerr's Stats. and Amdts., p. 474)**, § 1013.

§ 1090. **What is evidence of publication.** Evidence of the publication of a document or notice required by law, or by an order of a court or judge, to be published in a newspaper, may be given by the affidavit of the printer of the newspaper, or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when, and the

paper in which, the publication was made. **Kerr's Cyc. Code Civ. Proc.**, § 2010.

§ 1091. **Powers of superior judges at chambers.** The judge or judges of a superior court, or any of them, may, at chambers, grant all orders and writs which are usually granted in the first instance upon an ex parte application, and may, at chambers, hear and dispose of such orders and writs; and may also, at chambers, appoint appraisers, receive inventories and accounts to be filed, suspend the powers of executors, administrators, or guardians in the cases allowed by law, grant special letters of administration or guardianship, approve claims and bonds, and direct the issuance from the court of all writs and process necessary in the exercise of their powers in matters of probate. See **Kerr's Cyc. Code Civ. Proc.**, § 166.

§ 1092. **Presumption as to survivorship.** When two persons perish in the same calamity, such as a wreck, a battle, or a conflagration, and it is not shown who died first, and there are no particular circumstances from which it can be inferred, survivorship is presumed from the probabilities resulting from the strength, age, and sex, according to the following rules:

1. If both of those who have perished were under the age of fifteen years, the older is presumed to have survived;
 2. If both were above the age of sixty, the younger is presumed to have survived;
 3. If one be under fifteen and the other above sixty, the former is presumed to have survived;
 4. If both be over fifteen and under sixty, and the sexes be different, the male is presumed to have survived; if the sexes be the same, then the older;
 5. If one be under fifteen, or over sixty, and the other between those ages, the latter is presumed to have survived.
- See **Kerr's Cyc. Code Civ. Proc.**, § 1963, subd. 40.

Note.—The earthquake of April 18, 1906, at Santa Rosa, Sonoma County, California, was a "calamity" within the

meaning of section 1963, subd. 40, of the Code of Civil Procedure of that state; and where a husband and his wife both perished in that calamity, and they were both over fifteen and under sixty years of age, and it is not shown by any direct evidence who died first, the husband is presumed to have survived, in the absence of any particular circumstances from which it can be inferred who died first: *Grand Lodge etc., United Workmen v. Miller*, 6 Cal. App. 524, 525 (April 1, 1908).

§ 1093. Persons who cannot testify. The following persons cannot be witnesses: Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person. See *Kerr's Cyc. Code Civ. Proc.*, § 1880, subd. 3.

§ 1094. Form. Acknowledgment by corporation.

The certificate of acknowledgment of an instrument executed by a corporation must be substantially in the following form:¹

State of _____,
County² of _____, } ss.

On this _____ day of _____, in the year _____, before me,³ personally appeared _____, known to me⁴ to be the president⁵ of the corporation that executed the within instrument,⁶ and acknowledged to me that such corporation executed the same.

Explanatory notes. 1. See *Kerr's Cyc. Civ. Code*, § 1190. 2. Or, City and County. 3. Here insert the name and quality of the officer. 4. Or, proved to me on the oath of _____. 5. Or, the secretary. 6. Where, however, the instrument is executed on behalf of the corporation by some one other than the president or secretary, insert, after the blank following "appeared," the words: "known to me, or proved to me on the oath of _____, to be the person who executed the within instrument on behalf of the corporation therein named."

§ 1095. Form. Affidavit of posting notice.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]State of _____,
County² of _____, } ss.

_____, being duly sworn, says:

That he is, and at all times hereinafter named was, a deputy county clerk of said county, a male citizen of the United States, of the age of twenty-one years and upwards, not interested in the estate of _____ deceased; that he is competent to be a witness in the matter of said estate; and that on the _____ day of _____, 19____, he posted correct and true copies of the annexed notice in three of the most public places in said county, to wit; one of said copies at the place at which the court is held,³ one at _____,⁴ and one at _____.⁵

Subscribed and sworn to before me this _____ day of _____, 19____.

_____, County Clerk.⁶

Explanatory notes. 1. Give file number. 2. Or, City and County. 3. Name the place. 4, 5. As, city hall, land-office, sheriff's office, United States post-office in _____, etc. 6. Or other officer taking the oath.

§ 1096. Form. Appointment of special commissioner to take depositions.

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

The People of the State of _____.

To _____.

Know ye, That, trusting to your fidelity and circumspection, we have appointed you special commissioner, and do hereby authorize you to administer the necessary oaths, and take the depositions of _____ and _____, residing at _____, county of _____, state of _____, or either of them, in answer to the interrogatories direct, annexed hereto in the matter of the estate of _____, deceased.

All of which matter, together with this writ, you will return to this court according to law, in a sealed envelope,

directed to the clerk of said _____² court, at _____,³ state of _____, and forward the same by mail or express, or other usual channel of conveyance.

Witness, the Honorable _____, presiding judge of the _____⁴ court, county of _____, state of _____, this _____ day of _____, 19____.

Attest my hand and the seal of said court, the day and year last above written.

[Seal] _____, County Clerk of the County of _____, State of _____, and ex-officio Clerk of the _____⁵ Court thereof.

By _____, Deputy County Clerk and ex-officio Deputy Clerk of the _____⁶ Court.

Explanatory notes. 1. Give file number. 2. Title of court. 3. Name the place. 4-6. Title of court.

§ 1097. Form. Subpoena.

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

The People of the State of _____ send Greeting to _____ and _____ :

We command you, That, all and singular business and excuses being set aside, you appear and attend before our said _____² court of the county of _____, state of _____, at a session of said court, to be held in the court-room of said court,³ in the said county of _____, on the _____ day of _____, 19____, at _____ o'clock in the forenoon⁴ of said day, then and there to testify in the above-stated matter, now pending in said _____⁵ court; and for a failure to attend you will be deemed guilty of contempt of court and liable to pay all losses and damages sustained thereby to the parties aggrieved, and forfeit _____ dollars (\$_____), in addition thereto.

By order of the _____⁶ court, of said county⁷ of _____, this _____ day of _____, 19____.

Attest my hand and the seal of said court the day and year last above written.

[Seal]

_____, Clerk.
By _____, Deputy Clerk.

Explanatory notes. 1. Give file number. 2. Title of court. 3. State location of court-room. 4. Or, afternoon. 5, 6. Title of court. 7. Or, city and county.

§ 1098. Form. Summons. (Trustee as plaintiff.)

[Title of court.]

[Title of cause.]¹

{ No. ____² Dept. No. ____
 { [Title of form.]

The People of the State of ____, to all persons claiming any interest in or lien upon the real property herein described, or any part thereof, defendants, Greeting:

You are hereby required, To appear and answer the complaint of the ____,³ as trustee of the trusts created by the decree of partial distribution in the matter of the estate of ____, deceased, plaintiff, filed with the clerk of the above-entitled court and county,⁴ within three months after the first publication of this summons, and to set forth what interest or lien, if any you have, in or upon that certain real property, or any part thereof, situated in the county⁵ of ____, state of ____, and particularly described as follows: ____.⁶

And you are hereby notified, That, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint, to wit, a judgment and decree of this court establishing the title of said plaintiff to said real property and determining all estates, rights, titles, interests, and claims therein and thereto, and declaring plaintiff to be the owner in fee simple of the said real property, free and clear of any and all liens and encumbrances whatsoever.

Witness my hand and the seal of said court this ____ day of ____, 19__.

____, Clerk.

[Seal]

By ____, Deputy Clerk.

Memorandum.

The first publication of this summons was made on the ____ day of ____, 19__, in the ____, a newspaper printed in said county⁷ and state.

Dated this ____ day of ____, 19__,

____ and ____, Attorneys for Plaintiff.

Explanatory notes. 1. Give file number. 2. As, Union Trust Company of San Francisco, as Trustees of the Trusts Created by the Decree of Partial Distribution in the Matter of the Estate of —, Deceased, Plaintiff, v. All Persons Claiming Any Interest in or Lien upon the Real Property Herein Described, or Any Part Thereof, Defendants. 3. As, Union Trust Company, etc. 4, 5. Or, city or county. 6. Describe the land. 7. Or, city and county.

§ 1099. Form. Summons. (Executor as plaintiff.)

[Title of court.]

[Title of cause.]¹

{ No. —² Dept. No. —
[Title of form.]

The People of the State of —, to all persons claiming any interest in, or lien upon the real property herein described, or any part thereof, Greeting:

You are hereby required, To appear and answer the complaint of —, as executor of the will of —, deceased, filed with the clerk of the above-entitled court, within three months after the first publication of this summons, and to set forth what interest or lien, if any you have, in or upon that certain real property, or any part thereof, situated in the county³ of —, state of —, and particularly described as follows, to wit: —.⁴

You are hereby notified, That, unless you so appear and answer the complaint, plaintiff will apply to the court for relief demanded in the complaint, to wit, that it be adjudged that —, at the time of her death was the owner of said property in fee simple absolute and that her title to said property be established and quieted; that the court ascertain and determine all estates, rights, titles, interests, and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, and whether the same consists of mortgages or liens of any description; that plaintiff recover his costs herein, and for such other and further relief as may be meet in the premises.

Witness my hand and the seal of said court this — day of —, 19—.

[Seal]

—, Clerk.

By —, Deputy Clerk.

Memorandum.

The first publication of this summons was made on the _____ day of _____, 19____, in the _____, a newspaper published in said county * and state.

Memorandum.

The following named persons claim an interest in the foregoing described property adverse to plaintiff:

Names.	Address.
_____	_____
_____	_____
_____, Attorney for Plaintiff.	

Explanatory notes. 1. Give file number. 2. As, John Doe, as Executor of the Last Will and Testament of Mary Stiles, Deceased, Plaintiff, v. All Persons Claiming Any Interest in or Lien upon the Real Property herein Described, or Any Part thereof, Defendants. 3. Or, city and county. 4. Describe the land. 5. Or, city and county. See Kerr's Stats. and Amdts. to Codes, p. 848.

§ 1100. Form. Order of reference to court commissioner to examine and report on qualifications of sureties.

[Title of court.]

[Title of estate.]	{ No. ____ ¹ Dept. No. ____
	{ [Title of form.]

It is hereby ordered, That _____, court commissioner of the county of _____, state of _____, examine into the qualifications of the sureties _____ and _____, on the bond or undertaking of _____, the administrator² of the estate of _____, deceased, which said sureties are offered in the above-entitled cause, and to which exceptions have been taken by _____; and that said _____, take such action in the matter as is authorized by law, and report the same to this court with all convenient dispatch.

_____, Judge of the _____ * Court.

Explanatory notes. 1. Title of court. 2. Or, executor. 3. Title of court.

§ 1101. Form. Description of property. (In general.)

That certain lot of land lying and being in the city and county of San Francisco, state of California, commencing at

a point on the westerly line of Drumm street, distant thereon ninety-one (91) feet and eight (8) inches southerly from the southerly line of Sacramento street; thence southerly and along said westerly line of Drumm street forty-five (45) feet and ten (10) inches; thence at a right angle westerly one hundred and thirty-seven (137) feet and six (6) inches; thence at a right angle northerly forty-five (45) feet and ten (10) inches; thence at a right angle easterly one hundred and thirty-seven feet (137) and six (6) inches to the westerly line of Drumm street and the point of commencement, being Beach and Water Lot, No. 536.

§ 1102. Form. Brief description of parcels.

The following is a brief description of the several parcels of said real estate, all situate in said city and county of San Francisco, state of California, —

1. Lot situate at the southwest corner of Sacramento and Leidesdorff streets, being fifty-five (55) feet and three (3) inches on southerly line of Sacramento street by one hundred and twenty-two (122) feet six (6) inches on Leidesdorff street.

2. Lot at southeast corner of Front and Sacramento streets forty-five (45) feet ten (10) inches by seventy-seven (77) feet six (6) inches.

3. Lot on southerly line of Sacramento street distant thereon seventy-eight (78) feet six (6) inches east of the east line of Montgomery street; thence east twenty (20) feet by forty-five (45) feet ten (10) inches southerly.

4. Lot at southwest corner of Washington and Montgomery streets, being thirty-seven (37) feet six (6) inches on Washington street by forty-six (46) feet on Montgomery street.

5. Lot on the easterly line of Stockton street distant thereon twenty-eight (28) feet six (6) inches southerly from the southerly line of Jackson street; thence southerly on said line of Stockton street twenty-one (21) feet by seventy-eight (78) feet.

6. Lot at the southeast corner of Jackson and Stone streets, being twenty-eight (28) feet on Jackson street by forty-two (42) feet six (6) inches on Stone street.

§ 1103. Form. Description by course and distance.

Commencing at an angle point in the northwesterly line of Cliff Avenue formed by the two courses (A) N. 25° 15' E., 170 feet more or less, and (B) N. 78° 30' E., 180 feet more or less, which angle point is marked by an iron monument; running thence along Cliff Avenue S. 25° 15' W., 170 feet more or less to an angle point, which angle point is marked by an iron monument, said point being the most southerly corner of the building known as the Cliff-House stable; thence S. 25° 15' E., 350 feet more or less to an angle point, which angle point is marked by an iron monument; thence leaving Cliff Avenue S. 64° 45' W., 40 feet more or less to high water mark of the Pacific Ocean; thence following the meanderings of said high water mark, in a northerly direction to a point which bears N. 64° 45' W., from the point of commencement, being the premises which include the Cliff House, a portion of the Cliff-House stable, and also certain other lands to the south of the Cliff House.

§ 1104. Form. Order requiring notice of application for restoration of records, and of the setting of said application for hearing.

[Title of court.]

[Title of estate.]

{	No. _____ ¹	Dept. No. _____
	[Title of form.]	

On reading and filing the verified application of _____, the administrator² of the estate of _____, deceased, praying for an order restoring the records, processes, orders, papers, and files in said cause, —

It is ordered, That said application be heard before me, in said court, at its court-room³ in said county⁴ of _____, state of _____, on the _____ day of _____, 19____, at _____ o'clock in the forenoon⁵ of said day, or as soon thereafter as counsel can be heard, and that a copy of this notice be published in _____, a newspaper of general circulation, printed and published in said county⁶ of _____, daily for at least ten days, with the last day of publication at least five days before said hearing; and let service otherwise be made

on all persons known to be interested in said matter, not parties hereto, as provided by law.

Done in open court this ____ day of ____, 19__.

____, Judge of said ____ Court.

Explanatory notes. 1. Give file number. 2. Or (of the ____ Company of ____, executor of the will, and codicil thereto, of ____, deceased; or, of ____ and ____, executor and executrix of the will of ____, deceased), and of ____, ____, ____, and ____, children, next of kin, and sole heirs at law of said deceased, and like residuary legatees under his said will in the above-entitled matter; or as the case may be. 3. Give number of department, and location of courtroom. 4. Or, city and county. 5. Or, afternoon. 6. Or, City and County.

§ 1105. **Form.** Notice of application to restore destroyed records, by order of court, and of time and place fixed for hearing. (Case of entire destruction.)

[Title of court.]

[Title of estate.]

{ No. ____¹ Dept. No. ____
[Title of form.]

Notice is hereby given, That ____, the surviving executor² of the will of ____, deceased, has filed a written application, verified by affidavit, in the above-entitled proceeding, pending in and belonging to said court, showing that the original of the judgments, decrees, orders, documents, records, papers, processes, and files heretofore made, entered, or filed in the above-entitled matter, and the whole thereof, were and each of them was, entirely lost, injured, and destroyed by reason of a conflagration on the ____ day of ____, 19__; that said loss, injury, and destruction occurred without his fault or neglect; that he cannot obtain certified copies thereof, or either of them, and that said loss, injury, and destruction, unless supplied or remedied, will or may result in damage to him, and praying for an order of said court reciting what was the substance and effect of said lost, injured, or destroyed judgments, decrees, orders, documents, records, papers, processes, and files.

And notice is further given, That ____,³ the ____ day of ____, 19__, at ____ o'clock in the forenoon⁴ of said day,

and the court-room of said _____ court,⁵ in said county⁶ of _____, state of _____, have been fixed by the said court, as the time and place for the hearing of said application.

The application aforesaid is here and hereby specially referred to for all particulars thereby shown.

Dated _____, 19____. _____, Clerk.

[Seal] . By _____, Deputy Clerk.

_____, Attorney for Petitioner.⁷

Explanatory notes. 1. Give file number. 2. Or, _____ a corporation, as guardian of the estate of _____, a minor; or as the case may be. 3. Day of week. 4. Or, afternoon. 5. Give location of court-room. 6. Or, city and county. 7. Give address. See **Kerr's Stats. and Amdts. to Codes**, p. 639.

§ 1106. Form. Notice of application to restore destroyed records, by order of court, and of time and place fixed for hearing. (Case of partial destruction.)

[Title of court.]

[Title of estate.]

{ No. _____¹ Dept. No. _____
[Title of form.]

Notice is hereby given, That _____ as administrator² with the will annexed of the estate of said decedent, and as distributee of a portion of her estate, and _____, as devisee and legatee under decedent's said will, and _____, as their attorney of record in said matter, have filed therein their written application, verified by affidavit, in the above-entitled proceeding, pending in and belonging to said court, showing that the original of the judgments, decrees, orders, documents, records, papers, processes, and files heretofore made, entered, or filed in the above-entitled matter, and the whole thereof, were and each of them was, entirely lost, injured, and destroyed by reason of a conflagration on the 18th and 19th days of April, 1906, except only _____; ³ that said loss, injury, and destruction occurred without fault or neglect of petitioners, or any of them; that they cannot obtain certified copies thereof, or of either of them, except only _____; ⁴ and that said loss, injury, and destruction, unless supplied or remedied, will or may result in damage to them, and each of them, and praying for an order of said court, among other

things, reciting what was the substance and effect of said lost, injured, and destroyed judgments, decrees, orders, documents, records, papers, processes, and files, and including those of which said certified copies are alleged to be copies; and as to the latter, praying, among other things, that said certified copies supply the defect of their respective originals and thereafter have the same effect as the latter.

And notice is further given, That —, ⁵ the — day of —, 19—, at — o'clock in the forenoon ⁶ of said day, and the court-room of said — court, ⁷ in the said county ⁸ of —, state of —, have been fixed by the said court, as the time and place for the hearing of said application, which is here and hereby specially referred to, and made part hereof, for all particulars thereby shown.

Dated —, 19—.

—, Clerk.

[Seal]

By —, Deputy Clerk.

—, Attorney for Applicant.⁹

Explanatory notes. 1. Give file number. 2. Or as the case may be. 3. As, except only the authenticated copy of said will and of the probate thereof in the state of —, and the official bonds given by said administrator (or administratrix), all of which are on file in said matter and not destroyed. 4. As, except as to the letters of administration issued to said —, the order of sale of real estate, the order confirming sale of real estate, and the order of partial distribution, all of which are described in and set out by copy in said petition and application, and as to which, it is averred certified copies exist, and will be produced at the hearing of said petition and application. 5. Day of week. 6. Or, afternoon. 7. State location of court-room. 8. Or, city and county. 9. Give address. See **Kerr's Stats. and Amdts. to Codes**, p. 639.

§ 1107. **Form.** Complaint to cancel, annul, and set aside deeds, with prayer for an accounting and an injunction, and for the appointment of a receiver. (In action brought by heirs against widow, both as an individual and as special administratrix.)¹

[Title of court.]

[Title of cause.]²

{ No. — Dept. No. —
[Title of form.]

Now come the plaintiffs above-named and ³ for cause of action against the defendants above-named aver:

First Cause of Action.⁴

1. That —, who was the father of the plaintiffs, died intestate on the — day of —, 19—, and was, at the time of his death, a resident of the county⁵ of —, state of —, and left a large estate in said state of —, consisting of real and personal property;

2. That on the — day of —, 19—, the defendant, —, was by order of this court, duly given and made, appointed special administratrix of the estate of said —, deceased, upon giving bond in the sum of — dollars (\$—), and she thereafter duly qualified as such special administratrix by taking the oath required by law and giving bond as required by law and by said order, and thereupon and on the — day of —, 19—, special letters of administration upon the estate of said deceased were duly and regularly issued to her by the clerk of this court, pursuant to said order, and she has ever since been, and now is, the duly appointed, qualified, and acting special administratrix of the estate of said —, deceased;

3. That the said — is the surviving wife of the said —, and was his wife for more than — years continuously next prior to his death, and is a resident of the said county⁶ of —, state of —;

4. That the said —, deceased, left surviving him as his next of kin and only heirs at law, besides his said wife, five children, to wit: — and —, who are the plaintiffs herein, and —, —, formerly —, and —, all of whom are of full and lawful age⁸ and resident in the said county⁹ of —, state of —;

5. That the said —, deceased, was at the time of his death, and for many years prior thereto had been, and was at the respective dates of the purported deeds hereinafter referred to, the owner in fee of and in the possession of, all that certain real property in the state of —, particularly described as follows, to wit: —;¹⁰ and that plaintiffs are informed and believe, and upon such information and belief aver, that all of the said real property hereinbefore described was the separate property of said —;¹¹

6. That the said real property situated in the said county ¹² of _____, is of the value of _____ dollars (\$_____), and upwards, and that the said real property situated in _____, ¹³ is of the value of _____ dollars (\$_____), and upwards;

7. That on the _____ day of _____, 19____, the said _____, now deceased, under the circumstances herein set forth, and not otherwise, in form executed an instrument dated on that day, purporting to be a deed of conveyance from himself to defendant, _____, for that portion of the said real property hereinbefore particularly described, which is situated in the said county ¹⁴ of _____, which said instrument is in this complaint hereinafter designated and referred to as deed A; ¹⁵ and that on the _____ day of _____, 19____, ¹⁶ the said _____, now deceased, under the circumstances hereinafter set forth, and not otherwise, in form executed and acknowledged an instrument dated on that date, purporting to be a deed of conveyance from himself to said defendant, _____, of all the real property then belonging to the said _____, ¹⁷ in the state of _____, which said instrument is in this complaint hereinafter designated and referred to as deed B; ¹⁸

8. That there was no consideration whatever for either of the said purported deeds, and neither of the said purported deeds was ever delivered by said _____ ¹⁹ to the said _____; ²⁰

9. That each of said purported deeds was intended by the said _____ ²¹ to be, and was in fact, an attempted testamentary disposition by him of the real property therein described to take effect at, and in case of, his death, and not otherwise, and neither of said purported deeds was signed by the said _____ ²² in the presence of, or attested by, any subscribing witnesses or witness, and neither of said deeds was entirely written, dated, and signed by the said _____, ²³ in his own handwriting, or by his own hand. That plaintiffs are informed and believe, and upon such information and belief aver, that each of said deeds was by the said _____, ²⁴ after it had been in form executed and acknowledged by him as aforesaid, deposited and left with one _____, an attorney at law, who was then, and for some time prior thereto had been and thereafter and until the death of the said _____,

continued to be the attorney and agent of said —, ²⁵ upon the understanding that neither of said deeds should be delivered to the said —, ²⁶ nor put upon record until after the death of said —, and that each of said deeds should, during the lifetime of the said —, be subject to his control and be held by said — ²⁷ as his attorney and agent;

10. That after the death of the said —, and not sooner, the said —, ²⁸ obtained possession of both of the said purported deeds, and caused the said deed A ²⁹ to be filed for record and recorded on the — day of —, 19—, in — ³⁰ in the office of the county recorder of the county ³¹ of —, ³² state of —, and caused said deed B ³³ to be filed for record and recorded on the — day of —, 19—, in —, ³⁴ the office of the county recorder of the county ³⁵ of —, ³⁶ state of —, and that, as plaintiffs are informed and believe, and therefore aver, the said defendant, —, has caused, or is about to cause, the said B ³⁷ to be recorded in the respective offices of the county recorders of each of the said counties of — and —, etc.; ³⁸

11. That the said deeds were, and each of them was, by the said —, so in form executed and acknowledged and deposited with the said —, as aforesaid, at the instigation of the said —, ³⁹ in pursuance of a plan and scheme theretofore conceived and formed by her to obtain all of the property of the said — for herself to the exclusion of his said children;

12. That under and by virtue of the said two deeds of —, 19—, and —, 19—, the said defendant, —, claims to be the owner in fee in her own right, and in her individual capacity of all of the real property situated in the counties of — and —, etc., hereinbefore described, and claims that neither the estate, nor the heirs at law of the said —, deceased, nor herself as special administratrix of said estate, has, or have, any interest in, or title to the said real property, or any part thereof, or any right to the possession of said real property, or any part thereof, or any right to the rents, issues, and profits of said real property, or any part thereof, and that she threatens, and intends, and is proceeding, to collect and receive the entire

rents, issues, and profits from all of said real property and apply them to her own use, in her own right, and in her individual capacity, and in violation of her duty as such special administratrix of said estate;

13. That the said real property hereinbefore particularly described, situated in the counties of — and —, etc.,⁴⁰ consists of about — thousand (—) ⁴¹ acres of land, suitable and used for many different purposes, including the raising of grain, hay, alfalfa, vegetables and produce, roots for the food of stock, and for grazing, and the raising of cattle and sheep, and the production of wool, and is capable of producing, and will produce, under careful and prudent management, a very large income from the rents, issues, and profits thereof, to wit, the sum of — dollars (\$—), per annum and upwards;

That a very large part of said lands has heretofore been and can only be rented out on shares to many different tenants of many different portions and subdivisions thereof, and requires constant watching to see that the tenants on the shares properly plant, cultivate, and care for the crops raised thereon, and yield to the owner the proper share thereof at the proper times; and another very large part of said lands consists of grazing land, which is not fenced, and which can be made to produce a large income by constant watching and protection against the trespassing of stock from adjacent lands, but not otherwise; and that it is necessary that great care, diligence, and skill be used in securing reliable and responsible tenants for all of said lands, at the proper time, and to carefully watch the conduct by such tenants of the respective parcels so rented to them in order to see that the lands are properly cared for and that no depredation or waste is committed thereon, and that the terms and conditions of the respective leases are properly carried on and complied with by such tenants;

That the said lands require the constant care and attention and supervision of some person well versed and acquainted with the various kinds of farming, grazing, and stock raising aforesaid, and with the general supervision, conduct, and management of all the various kinds of lands aforesaid, to

secure reliable and responsible tenants, at the proper times, for all of said lands, and to see that the various tenants properly plant, cultivate, and care for the crops raised thereon and yield to the owner the proper shares therefor, at the proper times, and to dispose of the owner's shares of such crops to the best advantage, and to see that the said grazing lands are properly watched and protected against the trespassing of stock from adjacent lands, and to see that the terms and conditions of the various leases are properly carried out by the respective tenants, and that no waste or other depredations are committed upon any of such lands, in order to secure the fair and proper income which said lands are capable of producing;

That the defendant, —, is wholly ignorant of and unskilled in any of the kinds of business aforesaid, or in attending to any of the matters which it is necessary to attend to in and about the leasing, management, and control of said lands as aforesaid in order to secure the fair and proper income which said lands are capable of producing under proper management, and to protect the same against the trespassing, depredation, and waste aforesaid, and if the said defendant, —, is allowed to retain the management and control of said lands pending the determination of this action, the income from the rents, issues, and profits thereof will be greatly impaired and diminished and the said lands will suffer great damage from trespass, depredation, and waste. That the loss and damage which will result from the improper and unskilled management and control of said lands by impairment and diminution from the rents, issues, and profits thereof, and from trespass, depredation, and waste as aforesaid, if the said defendant, —, is allowed to retain the management and control of said lands pending the determination of this action is, and will be, difficult and impossible of determination or estimation;

That said real property situated in the county ⁴² of —, has upon it improvements rented to divers tenants, and produces a monthly income of — hundred dollars (\$—), per month and upwards; and

14. That by reason of the facts hereinbefore alleged, it

is proper and necessary for the protection of the rights of these plaintiffs that a receiver be appointed to take the possession, management, and control of all of the real property hereinbefore described, and to attend to the renting and leasing of said real property, and to collect and receive all the income from the rents, issues, and profits thereof and hold the same subject to such disposition thereof as may be directed by the court upon the final determination of this action.

Second Cause of Action.⁴³

And for a further and separate cause of action against the defendants above-named, the plaintiffs above-named aver as follows:

1. The plaintiffs here repeat and allege, and reaver all the matters and things set forth and alleged in the subdivisions numbered 1, 2, 3, 4, 5, 6, and 7 of the statement of the first cause of action in this complaint and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length;

2. That there was no consideration whatever for either of the said purported deeds;

3. (Repeat statements contained in subdivision numbered 10 of the first cause of action in this complaint);

4. That the said formal execution and acknowledgment, by the said —, now deceased, of each of the said deeds A and B,⁴⁴ was procured by and through the undue influence of his said wife, the defendant, —, and that the facts constituting such undue influence are as follows, —

That for a long time, to wit, about — years prior to his death, the said —, now deceased, was, and until the time of his death continued to be, afflicted with disease of both body and mind, and by reason thereof he became and was weak and ill, both in body and mind, and his mind was so weakened that he became childish and was unable at times to talk, or to understand knowingly the ordinary affairs of life or to understand or to transact business;

That while the said — was in such condition of mind and body, he was incapable of taking care of himself, and was in constant need of the care and attention of some other

person to see that his wants were properly administered to; and during all of said period he resided with, and was taken care of by, his said wife, the defendant, —, at their home in the county of —, ⁴⁵ state of —, and was entirely dependent upon her for the care and attention of which he was in need by reason of his disease of body and mind as aforesaid;

That by reason of the said diseased condition of body and mind of the said —, and by reason of his being dependent upon his said wife for the care and attention of which he was in need, as aforesaid, his said wife, the defendant, —, acquired and had, at the time of the said formal execution and acknowledgment, as aforesaid, of each of said purported deeds, a great and controlling influence over the mind and will of said —, and was thereby able to and did direct and dictate to him what he should do in matters relating to his property, and his condition was such, in his then weak condition of mind and body, that he feared to do otherwise than as his said wife dictated and directed him to do in matters relating to his property;

That while the said — was in the said condition of body and mind as aforesaid, and while he was so, as aforesaid, in the care and under the domination and control of the said —, ⁴⁶ she, the said —, conceived and formed the plan and scheme of procuring the said — ⁴⁷ to convey by deed all of his real property to her in order that she might obtain the same for herself to the exclusion of his children; and she, the said —, in pursuance of the said plan and scheme, with the intent, and for the purpose, of procuring the said — to execute the said deeds, taking an undue and unfair advantage of his said condition and of her domination and control over him, as aforesaid, and taking a grossly oppressive and unfair advantage of his necessities and distress of mind and body, at and many times before the time of the formal execution of each of said purported deeds, did state to the said — ⁴⁸ that his children were spendthrifts, and would not and could not preserve or take care of any property which they might receive from his estate at his death, and that his said chil-

dren had no filial affection for him and were anxiously awaiting his death to obtain his property and squander the same; and at, and many times before, the time of the formal execution of each of said purported deeds, did demand of the said —, ⁴⁹ that he convey all of his real property to her, the said —; and at, and many times before, the formal execution of each of said purported deeds, did threaten him that, if he did not do as she wished concerning the disposition of his property, she would cause him great trouble during his lifetime, and would cause him to be adjudged an incompetent person, and would cause a guardian to be appointed for his person and estate, and that a large part of his estate would be dissipated in litigation;

That by means of the said statements, threats, and demands of the said —, ⁵⁰ hereinbefore alleged, she, the said —, did so prevail upon and influence the said —, in his then weakened condition of mind and body, both at the time of the said formal execution of the said deed A, ⁵¹ and at the time of the said formal execution of the said deed B, ⁵² that he, the said —, was compelled to and did, against his will and wish, in form, execute and acknowledge the said deeds; and

That all of the said statements so made by the said —, ⁵³ were untrue, and were known by her at the time they were made to be untrue, and the same were made by her for the purpose of prejudicing, and did prejudice, the said —, ⁵⁴ against these plaintiffs and the balance of his children.

And plaintiffs further allege, with reference to said deed A, ⁵⁵ that the said — ⁵⁶ was, at the time of the said formal execution and acknowledgment of said deed, as aforesaid, and for a long time prior thereto had been, a prominent and zealous member of a certain society of religious enthusiasts;

That the said —, before he became weak and ill in body and mind as aforesaid, was not particularly interested in matters of religion, nor in the affairs of any religious society, but by reason of the undue influence, domination, and control exercised over him by his said wife in his said weak condition of mind and body as aforesaid, he was per-

suaded and unduly influenced by her to believe that his prosperity and success in business matters, as well as the salvation of his soul, depended upon his appropriating some part of his estate to religious uses, and, by reason of such belief so induced by her, to in form execute and acknowledge, as aforesaid, the said deed A⁵⁷ to her in order that she might, and upon her representation to him that she would, use and apply the said real property described therein, and the income therefrom, for the benefit of the religious society and similar societies. That the said property described in said last-named deed is of the value of — thousand dollars (\$——), and upwards, and produces a monthly income of — hundred dollars (\$——), and upwards; and that if the said — had been free from the said undue influence, domination, and control of his said wife he would not have been willing to convey or appropriate the said property, nor any substantial part of his property, for the religious purposes aforesaid, nor for any religious purpose;

That the said —, by reason of his condition of mind and body as aforesaid, at the time of the said formal execution and acknowledgment, as aforesaid, of each of the said deeds, was unable to resist the said undue influence of the said —, ⁵⁸ hereinbefore alleged, and being then and there under the domination and control of the said —, as aforesaid, and by reason of the said undue influence of the said —, hereinbefore alleged, as aforesaid, did in form execute and acknowledge the said deed A,⁵⁹ and the said deed B;⁶⁰ and

That if the said —, had been free from the said undue influence so exercised over him, as aforesaid, by the said —, he would not have executed or acknowledged the said deeds or either of them in form or otherwise;

5. That under and by virtue of the said two deeds, A and B,⁶¹ the said defendant, —, claims to be the owner in fee in her own right, and in her individual capacity, of all of the real property situated in the counties of — and —, etc.,⁶² hereinbefore described, and claims that neither the estate, nor the heirs at law of the said —, deceased, nor herself as special administratrix of said estate, has, or have,

any interest in, or title to the said real property, or any part thereof, or any right to the possession of said real property, or any part thereof, or any right to the rents, issues, and profits of said real property, or any part thereof, and that she threatens, and intends and is proceeding, to collect and receive the entire rents, issues, and profits from all of said real property and apply them to her own use, in her own right, and in violation of her duty as such special administratrix of said estate.

6. And the plaintiffs here repeat and allege, and reaver all the matters and things set forth and alleged in the subdivisions numbered 13 and 14 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length.

Third Cause of Action.⁶³

And for a further and separate cause of action against the defendants above-named these plaintiffs aver as follows:

1. Plaintiffs here repeat and allege, and reaver all the matters and things set forth and alleged in subdivisions numbered 1, 2, 3, and 4, of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length;

2. That the said —, deceased, was at the time of his death, and for many years prior thereto had been, and was, at the date of the deed in this cause of action hereinafter referred to, to wit, —,⁶⁴ the owner in fee of, and in the possession of, all that certain real property in the state of —, which is particularly described in the subdivision numbered 5 of the statement of the first cause of action in this complaint, and the plaintiffs here refer to the said particular description of all the real property in the state of —, which is particularly described in the said subdivision numbered 5 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of the statement of this cause of action the same as though herein set out at length;

3. That the said property situated in the county of _____,⁶⁵ is of the value of _____ thousand dollars (\$_____), and upwards, and that the said real property situated in the counties of _____ and _____, etc.,⁶⁶ is of the value of _____ millions of dollars (\$_____), and upwards;

4. That on the _____ day of _____, 19____,⁶⁷ the said _____, now deceased, under the circumstances hereinafter set forth, and not otherwise, in form executed and acknowledged an instrument dated on that date, purporting to be a deed of conveyance from himself to the defendant, _____, of all the real property then belonging to the said _____, in the state of _____, which said instrument is in this complaint herein-after designated and referred to as deed B;⁶⁸

5. That there was no consideration whatever for said deed B;⁶⁹

6. That after the death of the said _____, and not sooner, the said _____⁷⁰ obtained possession of said deed B,⁷¹ and caused the same to be filed for record and recorded on the _____ day of _____, 19____, in _____⁷² in the office of the county recorder of the county of _____, state of _____, and that, as plaintiffs are informed and believe, and therefore aver, said defendant, _____, has caused or is about to cause, the said deed B,⁷³ to be recorded in the respective offices of the county recorders of each of the other counties in which is situated any part of said real property hereinbefore referred to;

7. That the said formal execution and acknowledgment of the said deed B,⁷⁴ was procured by and through the fraud of his said wife _____, and that the facts constituting such fraud are as follows, —

That at and before the time of the said formal execution of said deed, the said _____,⁷⁵ with intent to deceive the said _____, now deceased, and to induce him to execute the said deed, promised to the said _____, that if he, the said _____, would execute and acknowledge a deed to her, the said _____, of all his real property in the state of _____, she, the said _____, could and would, after his death, divide all of the said property equally and proportionately among all of his said children and herself, according to the laws of inheri-

tance of the state of —, and represented to him that such a course would save a large amount of expense which would otherwise be necessary in and about the administration of his estate after his death;

That the said —, believed and relied upon the said promise, and was by the said promise induced to in form execute and acknowledge the said deed B,⁷⁶ and that the said — would not in form, or at all, have executed or acknowledged the said deed as aforesaid, if the said promise had not been made;

That the said promise upon the part of the said — was made by her without any intention on her part of ever performing it, and that she has, since the death of the said —, and also prior to his death, but without his knowledge, repudiated the said promise, and that she has since his death refused, and still refuses, to carry out or to perform said promise or any of the terms and conditions of said promise, and repudiates the same entirely;

8. That whatever title passed to, or vested in, the said —,⁷⁷ under or by virtue of the said deed B,⁷⁸ in or to any of said real property hereinbefore referred to, is held by her in trust for these plaintiffs to the extent of such interest therein as they would have succeeded to under the laws of succession of the state of —, as heirs at law of said —, deceased, if said deed B⁷⁹ had not been made, and the said —⁸⁰ had been the owner of said real property at the time of his death;

That plaintiffs are informed and believe, and upon such information and belief aver, that all of the said real property hereinbefore referred to was the separate property of the said —,⁸¹ and that the interest therein of these plaintiffs, as his heirs at law, was and is the undivided —⁸² of all of said real property; and

9. That under and by virtue of the said deeds the said —⁸³ claims to be the owner in fee in her own right, and in her individual capacity, of all of the said real property, and claims that neither the estate nor the heirs at law of the said —, deceased, nor herself as special administratrix of said estate has, or have, any interest in, or title to, the said

real property, or any part thereof; nor any right to the possession of said real property, or any part thereof, nor any right to the rents, issues, and profits of said real property, or any part thereof, and that she threatens, and intends to and is proceeding, to collect and receive the entire rents, issues, and profits from all of said real property and apply them to her own use, in her own right, and in her individual capacity.

10. And these plaintiffs here repeat and allege, and reaver all the matters and things set forth and alleged in the subdivisions numbered 13 and 14 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length.

Fourth Cause of Action.²⁴

And for a further and separate cause of action against the defendants above-named, the plaintiffs above-named aver as follows:

1. These plaintiffs here repeat and allege and reaver all the matters and things set forth and alleged in the subdivisions numbered 1, 2, 3, 4, 5, 6, and 7 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length;

2. That there was no consideration whatever for either of said purported deeds;

3. (Repeat statements contained in subdivision numbered 10 of the first cause of action in this complaint);

4. That at the time when the said — in form executed and acknowledged each of the said purported deeds as aforesaid, the said — was, and thereafter and up to the time of his death continued to be, a person of unsound mind;

5. That the said deeds were, and each of them was, by the said — so in form executed and acknowledged at the instigation of the said —, in pursuance of a plan and scheme theretofore conceived and formed by her to obtain all of the property of the said — for herself to the exclusion of his said children; and

6. (Repeat the subdivision numbered 12 of the statement of the first cause of action);

7. The plaintiffs here repeat and allege, and reaver all the matters and things set forth and alleged in the subdivisions numbered 13 and 14 of the statement of the first cause of action in this complaint, and pray that the same be taken and deemed a part of this cause of action the same as though herein set out at length.

Wherefore plaintiffs pray for a decree of this court as follows:

Canceling, annulling, and setting aside the said deeds A and B,^{ss} and the record thereof, in whatever counties the same have been heretofore or may hereafter be recorded, and declaring the said deeds and each of them and the record thereof as aforesaid to be void and of no effect, and that no right, title, interest, or estate passed to the said defendant —, under, or by virtue of, either of said deeds in or to any of the property described or referred to therein, and;

Adjudging and decreeing that the real property described and referred to in said deeds was owned in fee simple by the said —, deceased, at the time of his death, and that the same constituted part of the property of his estate subject to administration;

Adjudging and decreeing that the title to said real property is vested in the said —, and the said —, —, —, —, and —,^{ss} as the widow and children of said —, in accordance with the laws of succession of the state of —, subject only to the control of this court sitting as a court of probate, in the matter of administering upon the estate of said deceased, and to the possession of any administrator appointed for said estate, and that the said defendant, —, in her individual capacity, has no right, title, interest, or estate in or to the said real property, or any part thereof, other than such as she may have acquired under the laws of succession of this state as the surviving wife of the said —, deceased, and that she be forever enjoined from asserting any other right, title, interest, or estate in or to the said real property or any part thereof;

That the said defendant, —, be enjoined and restrained, pending the final determination of this action, from conveying or encumbering, or in any manner disposing of, any of the said real property, or any of the rents, issues, and profits thereof, and that such injunction be made perpetual by the said final decree herein;

That an accounting be taken of all the rents, issues, and profits collected or received by the said —⁸⁷ from the said real property, or any part thereof, and that she be adjudged to hold the same in her capacity as special administratrix of the estate of the said —, deceased, and that she be required to account for and charge herself with the same in her account as such, and;

Adjudging and decreeing that whatever title passed to, or is vested in, the said defendant —, under or by virtue of the said deed B,⁸⁸ in or to any of the said real property situated in the counties of — and —, etc.,⁸⁹ is held by her in trust for these plaintiffs to the extent of the undivided —⁹⁰ thereof and requiring her to convey to these plaintiffs the said undivided —⁹¹ thereof, and to account for and pay over to these plaintiffs —,⁹² of all the rents, issues, and profits collected or received by her from said real property, or any part thereof, situated in the counties of — and —, etc.⁹³

And the plaintiffs further pray that a receiver be appointed in this action to take possession, management, and control of all of the real property in this complaint hereinbefore described and to attend to the renting and leasing of the said real property and to collect and receive all of the rents, issues, and profits thereof and hold the same subject to such disposition thereof as may be directed by the court upon the final determination of this action.

And plaintiffs pray for such other, further, and different relief as the justice and equity of their case may entitle them to receive, and which may appear to the court to be meet and proper in the premises; and for their costs of suit herein. — and —, Attorneys for Plaintiffs.

Dated —, 19—.

Verification of Complaint.

State of _____,
County ⁹⁴ of _____, } ss.

_____, being duly sworn, says, That he is one of the plaintiffs in the within-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to such matters as are therein stated upon information or belief, and that as to those matters he believes it to be true. _____

Subscribed and sworn to before me this _____ day of _____,
19____. _____, Notary Public, etc.⁹⁵

[Seal]

Explanatory notes. 1. As, _____ and _____, Plaintiffs v. Mary Stiles and Mary Stiles as Special Administratrix of the Estate of _____, Deceased, Defendants. 2. As given in note 1. 3. If amended complaint is filed continue; by leave of court first had and obtained file this their first amended complaint and, etc. 4. No consideration; nor delivery; attempted testamentary disposition. 5, 6. Or, city and county. 7. Married name of female heir. 8. Or, as the fact may be. 9. Or, city and county. 10. Give full and detailed description of each and every parcel of land owned by deceased, in his lifetime, in whatever county or counties of the state the same is situated. 11. The deceased. 12. Or, city and county, wherein suit is brought. 13. Various other counties of the state, giving their names. 14. Or, city and county, wherein suit is brought. 15. For the purposes of this form. In the complaint itself it should be referred to as the deed of _____, giving its exact date. 16. These two deeds are supposed to have been made about a year apart. 17. Deceased. 18. See note 15. 19. Deceased. 20. Defendant. 21-25. Deceased. 26. Defendant. 27. Attorney. 28. Defendant. 29. See note 15. 30. Give book and page of deeds in which record was made. 31. Or, city and county. 32. Where suit is brought. 33. See note 15. 34. Give book and page of deeds in which record was made. 35. Or, city and county. 36. Naming the county, outside of the one in which suit was brought, in which the record was made. 37. See note 15. 38. Naming the various other counties in which the decedent, in his lifetime, owned property. 39. Defendant. 40. Various counties outside of that in which suit is brought. 41. Figures. 42. In which suit is brought. 43. Undue influence of wife. 44. Give exact date of each. 45. Wherein suit is brought. 46. Defendant. 47-50. Decedent. 51, 52. Give exact dates. 53. Defendant. 54. Deceased. 55. Give exact date. 56. Defendant. 57. Give exact date. 58. Defendant. 59-61. Give exact

dates. 62. All counties in which deceased owned real estate. 63. No consideration and fraud. 64. Give exact date of deed B. 65. Wherein suit is brought. 66. Other counties than that in which suit is brought. 67-69. Give exact date of deed B. 70. Defendant. 71. Give exact date. 72. Give book and page of deeds. 73, 74. Give exact date. 75. Defendant. 76. Give exact date. 77. Defendant. 78, 79. Give exact date. 80, 81. Deceased. 82. Give fractional part. 83. Defendant. 84. No consideration and unsoundness of mind. 85. Give exact dates. 86. Give both married and family names of married female children. 87. Defendant. 88. Give exact date. 89. All counties in which decedent owned lands. 90-92. Give fractional part. 93. All counties in which decedent owned lands. 94. Or, city and county. 95. Or other officer taking the oath. The statute of California permits the verification of a pleading to be made on information "or" belief. It does not require it to be made on information "and" belief. See *Kerr's Cyc. Code Civ. Proc.*, § 446. Under such a statute it would seem that the affiant may swear to what he "believes" to be true, though he has no information on the subject; or, he may swear to facts as to which he has been informed though he may have no belief as to their truth. A verification of an answer, however, under such statute, made on information "and" belief, is not necessarily defective: *Christopher v. Condogorge*, 128 Cal. 581, 584. A verification upon information "and" belief, though not complying in form with the exact language of the statute is sufficient: *Ely v. Frisbie*, 17 Cal. 250, 257. Such a verification is a substantial compliance with the statute: *Kirk v. Rhoads*, 46 Cal. 398, 403.

**TESTIMONY OF PARTIES, OR PERSONS INTERESTED, FOR
OR AGAINST REPRESENTATIVES, SURVIVORS, OR SUC-
CESSORS IN TITLE OR INTEREST OF PERSONS
DECEASED OR INCOMPETENT.**

1. Application of statute.

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4. Who are incompetent.

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| (1) In general. | (7) Physician's services to deceased. |
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| (5) Action by or against surviving partner. | (11) Establishment or enforcement of trusts. |
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| | (13) Incompetency in other particular instances. |

1. Application of statute.

(1) In general. California statute. At one time, a party was prohibited from testifying, in any case where the adverse party was "the representative of a deceased person," as to facts which occurred before the death of the deceased; but this law has been changed in California to the provision that a party cannot be a witness in an action against an executor or administrator "upon a claim or demand against the estate of a deceased person": *Booth v. Pendola*, 88 Cal. 36, 43; 23 Pac. Rep. 200; 25 Pac. Rep. 1101; and it is settled, in such state, that the provision applies only to actions upon such claims or demands against the decedent as might have been enforced against him, in his lifetime, by personal action for the recovery of money, and upon which a money judgment could have been rendered: *Wadleigh v. Phelps*, 149 Cal. 627, 640; 87 Pac. Rep. 93, 99. The incompetency of the witness applies only to those parties who assert claims against the estate: *Todd v. Martin* (Cal.), 37 Pac. Rep. 872, 874. But the statute applies not only to parties who have an interest adverse to the estate but to all nominal parties to the action: *Blood v. Fairbanks*, 50 Cal. 420, 422. It is considered that the word "parties," in the California statute, does not refer to the executor or administrator who is the party defendant. If, however, the executor or administrator is the assignor of the claim asserted by the plaintiff, or is a person for whose benefit it is prosecuted, or himself asserts a claim, as he may do, the other language of the section is sufficient either to fix him as the party prosecuting the claim, or as the party for whose benefit it is prosecuted, and, upon that ground, to make him incompetent, but it does not do so simply because he is the party defendant: *Todd v. Martin* (Cal.), 37 Pac. Rep. 872, 874. Where an action has been delayed for about seven years, and until after the distribution of the estate, and such action is brought against the distributees of the decedent's estate for the purpose of avoiding the incompetency of the plaintiff to testify against the estate, the statute of limitations ought to apply to the action: *Nicholson v. Tarpey*, 124

Cal. 442, 450; 57 Pac. Rep. 457. A court will not allow the doctrine of estoppel to be invoked so as to defeat the statute relative to testimony as to transactions with deceased persons. Thus where an action was brought against "Hanson & Co.," an alleged co-partnership, but Charles Hanson afterward died, and the executors of his will were substituted as defendants, and a judgment was entered against the executors, "payable in due course of administration," and the estoppel set up by the plaintiff was, that plaintiff had been induced by Charles Hanson to engage with Hanson & Co., believing the latter to be a co-partnership, and that neither Charles Hanson nor his representatives could be heard to dispute the fact; that the claim sued upon was not against the estate, but was against the partnership; that it was not "an action pending against the decedent at the time of his death"; and that the section of the statute relative to testimony as to transactions with deceased persons did not apply, the court held that the statute could not be thus evaded, especially where the claim against the estate was not presented to the executors in accordance with law. In other words, one statute was violated in order to create a situation which would render the other statute inapplicable, or which would permit its violation: *Frazier v. Murphy*, 133 Cal. 91, 98; 65 Pac. Rep. 326. The California statute is not to be construed as prohibiting an executor or administrator from calling a party to the action to testify in behalf of the estate: *Chase v. Evoy*, 51 Cal. 618, 620.

(2) **Same. Statutes of other states.** The statute of Arizona provides that "in an action by or against executors, administrators, or guardians in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." The evident purpose of this statute was to leave the competency of either party's testimony, respecting such "transaction" or "statement," to the sound discretion of the court: *Goldman v. Sotelo*, 7 Ariz. 23; 60 Pac. Rep. 696, 697. In a statute providing that in civil actions or proceedings by or against executors, administrators, heirs at law, or next of kin, in which judgment may be rendered or order entered, for or against them, neither party shall be allowed to testify against the other, as to any transaction whatever with, or statement by, the testator or intestate, unless called to testify thereto by the opposite party, the word "party" is used in its technical sense, and does not include one who is not a party, though he may have a beneficial interest in the result of the issue: *Witte v. Koeppen*, 11 S. D. 598; 79 N. W. Rep. 831, 832. The Kansas statute, which prohibits a party from testifying in his own behalf, in respect to any transaction or communication had

personally with a deceased person, etc., applies only to a party to the suit: *Mendenhall v. School District* (Kan.), 90 Pac. Rep. 773. In Utah, the disqualification, under the statute, has been held to apply whether the action has been brought by or against an administrator: *Ewing v. White*, 8 Utah, 250; 30 Pac. Rep. 984. The statute does not disqualify one from being a witness. It only prohibits him from telling "of any transactions had by him with, or any statements made to him by," the decedent: *Kauffman v. Bailie* (Wash.), 89 Pac. Rep. 548, 550. It is the witness who is incompetent, not the evidence. Hence an objection that the evidence is incompetent does not reach the incompetency of the witness: *Crebbin v. Jarvis*, 64 Kan. 885; 67 Pac. Rep. 531, 532. While the statutes of the various states upon this subject differ somewhat, there is an underlying principle upon which all of them are founded. The purpose of these statutes is to guard against the temptation of giving false testimony in regard to a transaction in question, on the part of a surviving party, and further, to put the two parties to the suit upon terms of equality in regard to the opportunity of giving testimony. The scope of the rule excludes the testimony of the survivor of the transaction with the decedent when offered against the latter's estate. The statute, in this regard, is intended to protect the estates of the deceased persons from assaults, and relates to proceedings wherein the decision sought by the party so testifying would tend to reduce or to impair the estate: *In re Miller's Estate*, 31 Utah, 415; 88 Pac. Rep. 338, 344.

(3) **Equal footing, and equal balance of disadvantages.** The purpose of the statute relative to testimony as to transactions of deceased persons is to prevent parties from testifying to matters tending to establish the claim or demand, and not to prevent their testifying to other matters which may arise incidentally: *Knight v. Russ*, 77 Cal. 410, 413; 19 Pac. Rep. 698. It is true that it may be a hardship upon the plaintiff to be prevented, by the law, from contradicting the testimony of third persons as to admissions not made in the presence of deceased, but, on the other hand, it can be said with equal force, that it is a hardship on the estate that the deceased is prevented, by death, from denying any admissions against his interest which witnesses for the plaintiff may testify were made by him in his lifetime. The manifest object and purpose of the statute is to put them on an equal footing in respect to such evidence. And, besides, there is nothing in the statute to indicate that its effect was intended to be limited to things which occurred in the presence of the deceased. The language is: "any matter or fact occurring before the death of the deceased," and this applies as well to things occurring without his presence, as to those in which he might have participated: *Stuart v. Lord*, 138 Cal. 672, 677; 72 Pac. Rep. 142. In cases of actions on claims against an estate, the rule that a plaintiff need not prove the necessary allegation

of non-payment may sometimes place the executor or administrator at a disadvantage. But this disadvantage is about equally balanced by the provisions of the statute relative to testimony as to transactions with deceased persons, which disqualifies parties and assignors of parties to an action, as witnesses, upon a claim or a demand against the estate of a deceased person, "as to any matter of fact occurring before the death of such deceased person." In the one case, the law, and in the other, death, has closed the mouth of the party most likely to know the fact: *Hurley v. Ryan*, 137 Cal. 461, 462; 70 Pac. Rep. 292. The inability of a claimant against the estate of a decedent to testify against an executor or administrator is his misfortune. He must produce evidence to sustain his cause of action: *Lichtenberg v. McGlynn*, 105 Cal. 45, 48; 38 Pac. Rep. 541; *Barthe v. Rogers*, 127 Cal. 52; 59 Pac. Rep. 310; *Stuart v. Lord*, 138 Cal. 672, 677; 72 Pac. Rep. 142. In Oregon, one who has a claim against the estate of a deceased person is a competent witness, but the statute requires him to establish his claim upon some competent and satisfactory evidence other than his own testimony. If he does this, he can recover; otherwise not: *Goltra v. Penland*, 45 Or. 254; 77 Pac. Rep. 129; *Bull v. Payne*; 47 Or. 580; 84 Pac. Rep. 697; *Harding v. Grim*, 25 Or. 506; 36 Pac. Rep. 634.

(4) **Meaning of terms.** The term "claims," standing by itself in the probate law, has reference only to such debts or demands against the decedent as might have been enforced against him in his lifetime by personal action for the recovery of money, and upon which a money judgment only could have been rendered: *Fallon v. Butler*, 21 Cal. 24, 32; 81 Am. Dec. 140. Where a fire destroyed a kiln on leased premises, a witness who had assigned all his interest in the lease and business before the fire, is not the "assignor" of a cause of action brought after the fire for the breach of a contract by the lessor to replace the kiln. Hence he is not incompetent to testify to events occurring before the death of the lessor, who died after the fire, under a statute which provides that an "assignor" shall not be a witness upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person: *Frey v. Vignier*, 145 Cal. 251, 252, 254; 78 Pac. Rep. 733. The words "adverse party," as used in the Kansas statute, are not limited to the adversary positions of plaintiff and defendant, but affect any party, whether plaintiff or defendant, whose interests are actually adverse to those of another party to the action, who appears in the capacity of executor, administrator, heir at law, next of kin, surviving partner, or assignee, where the latter has acquired title to the cause of action immediately from a deceased person: *American Inv. Co. v. Coulter*, 8 Kan. App. 841; 61 Pac. Rep. 820. In a statute, which excludes as incompetent, with certain specified exemptions, the testimony of one having a direct legal interest in the result of any civil action or proceeding, concerning any

transaction or conversation occurring between the witness and a person since deceased, when the adverse party is the representative of such deceased person, the word "transaction" embraces every variety of affairs which forms the subject of negotiations or actions between the parties. The prohibition is general, and applies to written as well as to verbal transactions. No transaction with or statement by a deceased person is excepted, but all are included; and a party, who has a direct legal interest in the result of an action, is precluded from testifying against the representative of a deceased person as to any transaction or conversation between the witness and such deceased person, except in the instances specifically enumerated in the statute: *Kroh v. Heins*, 48 Neb. 691; 67 N. W. Rep. 771; *Smith v. Perry*, 52 Neb. 738; 73 N. W. Rep. 282; *Harte v. Reichenberg* (Neb.), 92 N. W. Rep. 987. And the word "representative," in such a statute, includes any person or party who has succeeded to the rights of the decedent, whether by purchase, descent, or operation of law: *Kroh v. Heins*, 48 Neb. 691; 67 N. W. Rep. 771. The word "claim" or "demand" in the statute, which provides that parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted against the executor or administrator, upon a claim or demand against the estate of the deceased, does not include a claim for a family allowance: *Estate of McCausland*, 52 Cal. 568, 577. In a statute which prohibits either party to an action from testifying against the other as to any transaction whatever with, or statement by, a deceased person, the word "transaction" means a transaction in which the decedent took part, and was a party to, and participated in: *First Nat. Bank. v. Hilliboe* (N. D.), 114 N. W. Rep. 1085, 1086.

2. Particular matters to which statute does not apply.

(1) **In general.** Where the action is not technically founded upon a "claim" against the estate, the plaintiff is not within the prohibition of the statute. Hence the statute does not apply to a suit, against a decedent's executor, to have an absolute conveyance to said decedent declared to operate as a mortgage, and for redemption: *Wadleigh v. Phelps*, 149 Cal. 627, 640; 87 Pac. Rep. 93, 99. Nor does the statute prohibit the claimant of a mechanic's lien against buildings, erected by a deceased person, from being a competent witness to testify as to facts occurring before the death of the owner, in an action against the representative of his estate, as the lien is not a "claim" against the estate, within the meaning of the statute: *Booth v. Pendola*, 88 Cal. 36, 44; 23 Pac. Rep. 200; 25 Pac. Rep. 1101. Although a witness is a party to an action against the estate of a deceased person, he may testify as to conversations not relating to matters transpiring before the death of decedent, as such evidence is not within the statutory prohibition: *Tourtellotte v. Brown*, 18 Col. App. 335; 71 Pac. Rep. 638, 639. When a person, sued individually for the conversion of property,

undertakes to defend as administrator, he must establish, by positive averment and proof, his status as administrator, and that he is possessed of, or entitled to, such property, and chargeable therewith, in such capacity, by some appropriate preliminary trial, before the opposite parties, or other interested parties, can properly be excluded as witnesses upon the merits of the case: *Pewitt v. Lambert*, 19 Cal. 7; 34 Pac. Rep. 684. The statutory rule that parties and persons directly interested in an action are precluded from testifying therein of their own motion, where the opposite party sues or defends as an administrator, etc., is not applicable in favor of one who is not sued as administrator, and who does not, by his answer, defend as such: *Prewitt v. Lambert*, 19 Cal. 6; 34 Pac. Rep. 683. In a suit, brought against the successors of a deceased person, to declare a partnership in mining property, the plaintiff is entitled to testify therein, as such an action is not technically founded upon a "claim" against the estate, and the plaintiff is, therefore, not within the prohibition of the statute: *Bernardis v. Allen*, 136 Cal. 7, 9; 68 Pac. Rep. 110. In an action against an agent, to set aside a deed made to him on the ground of the latter's fraud, the death of defendant, pending the suit, and the substitution of his administrator as defendant, does not affect the competency of plaintiff as a witness. Such an action is not a claim against the estate, but is brought to establish the fact that the land described in the complaint never became a part of his estate: *Calmon v. Sarraillie*, 142 Cal. 638, 642; 76 Pac. Rep. 486. Notwithstanding statutes like those under consideration, a foundation for the introduction of account books may be laid through the testimony of plaintiff himself. He may testify as to the correctness of books of account which have been wholly kept by him, preparatory to their introduction in an action against an executor or administrator: *Cowdrey v. McChesney*, 124 Cal. 363; 57 Pac. Rep. 221; *Roche v. Ware*, 71 Cal. 375, 378; 60 Am. St. Rep. 539; 12 Pac. Rep. 284. And, in such an action, the officers of a bank are competent witnesses to make preliminary proof for the purpose of admitting the books of account of the bank in evidence: *City Sav. Bank v. Enos*, 135 Cal. 167, 172; 67 Pac. Rep. 52.

(2) **Claim in favor of estate.** The statute which prohibits a party in whose favor an action is prosecuted against an estate from being a witness, does not apply to a person against whom an action is prosecuted by an executor or an administrator on a claim in favor of an estate: *Sedgwick v. Sedgwick*, 52 Cal. 336. The defendant, in such a case, is a competent witness as to transactions between himself and the decedent: *McGregor v. Donelly*, 67 Cal. 149; 7 Pac. Rep. 422. In an action upon a note, made payable to plaintiff's intestate, which was in plaintiff's possession as administratrix, and which was offered in evidence, the introduction of the note, with the indorsements of payments thereon made by decedent, is not making the decedent a witness,

and the statute does not apply: *Locke v. Klunker*, 123 Cal. 231, 239; 55 Pac. Rep. 993.

(3) **Controversies as to relative rights of heirs or devisees.** The statute does not relate to the relative rights of the heirs or devisees as to the distribution of an estate in a proceeding by which the estate itself is, in no event, to be reduced or impaired. Hence in a controversy between living parties, where persons on the one side are the devisees or legatees under a will, and on the other, the heirs at law of the testator (the former claiming to take the estate under the will, and the latter under the statute regulating the descent of estates, and insisting that the alleged will is a nullity); where the act of the testator, in making the alleged will, is the only subject-matter of the investigation; where the estate of the testator is not interested; where the interest of those claiming succession to it, either by operation of the law, or by operation of the will, are alone involved; and where the estate remains intact and undiminished, whatever may be the result of the controversy, the subject-matter of the investigation is not a transaction with nor a statement by the decedent, and as to such investigation the parties to the suit, and those interested in the result thereof, are upon terms of equality in regard to the opportunity of giving testimony. All the parties interested are, therefore, competent to testify to any fact which is relevant and material to the issue involved: *In re Miller's Estate*, 31 Utah, 415; 88 Pac. Rep. 338, 344.

(4) **Actions to quiet title.** The statute does not apply to an action to quiet title. A wife, who sues the administrator of her husband's estate, is a competent witness to establish a conveyance of certain land from her husband to her, and to quiet the title. In such a case, she is not seeking to enforce a "claim" against the estate, but merely to have it declared that the estate has no interest in the property: *Poulson v. Stanley*, 122 Cal. 655; 55 Pac. Rep. 605, 606. So in an action by a husband against the administrator of his deceased wife, to quiet the title to land which was community property, the husband is a competent witness, as such an action is not on a "claim" against the estate: *Bollinger v. Wright*, 143 Cal. 292; 76 Pac. Rep. 1108, 1110. It is concerning the property of plaintiff and to quiet a claim or demand, or title asserted by the estate to such property. The question to be determined is as to whether or not the interest held by the deceased under the deed is the property of the estate, or the property of the plaintiff. If it is not the property of the estate, then the action does not involve a demand against the estate: *Bollinger v. Wright*, 143 Cal. 292, 296; 76 Pac. Rep. 1108. But in Washington, in a suit to quiet title, brought against a defendant, who claims title to a part of the land as heir of his deceased mother, whom plaintiff had married before he acquired the land, the plaintiff will not be permitted to

testify that he was never married to her. The plaintiff is incompetent to testify to any transaction between himself and the deceased, under whom the defendant, as an adverse party, claims title: *Nelson v. Carlson* (Wash.), 94 Pac. Rep. 477, 478.

3. Who are competent.

(1) **In general.** The fact that a witness is personally interested in sustaining the alleged claim of plaintiff, against the estate of decedent, does not affect his competency to testify. At most, it can be considered only in determining what weight should be given to his testimony: *Warren v. McGill*, 103 Cal. 153, 156; 37 Pac. Rep. 144. And a witness, having been called by the adverse party and examined by him as a witness, upon certain matters pertinent to some of the issues in the case, is competent for all purposes: *Warren v. Adams*, 19 Col. 515; 36 Pac. Rep. 604, 606. Under the provisions of the Colorado statute, the parties to an action are competent witnesses in their own behalf, and they are thus placed on an equality. When a party sues or defends as the executor or administrator of a deceased person, the parties are placed on an equality by excluding the testimony of the adverse parties. But if the deposition of the deceased parties has been taken, "it may be read in any stage of the same action or proceeding, by either party, and shall then be deemed evidence of the party reading it." In such cases, if the deposition is read on behalf of the executor or administrator, the adverse party would be excluded from testifying in his own behalf, but for the provision of the statute which permits him to testify "as to all matters and things which are testified to in such deposition," when such deposition has been read in evidence. This provision was enacted to meet circumstances not covered by the other provisions of the statute, and to place the parties on an equality. The equality is preserved by the restriction placed upon the testimony of the living party. The fair implication arising from this restriction is that the testimony of the living parties is to be in rebuttal of the deposition of the deceased parties; that it is optional with the executor or administrator to introduce the deposition in evidence, or to withhold it from introduction: *Levy v. Dwight*, 12 Col. 101; 20 Pac. Rep. 12, 14. If the testimony of a deceased party, given on a former trial, is offered in evidence by the executor or administrator of such deceased party, the reason for the exclusion of the testimony of the living party is taken away, and to bring the parties on an equality, as is the intention of the statute, the living party must be allowed to testify in his own behalf, as to the matters testified to by the deceased party on the former trial. The testimony of the deceased, given at a former trial, may be offered in evidence by the living party, and then it is to be regarded as the testimony of his own witness, and subject to all the rules applicable to the testimony of any other witnesses in his behalf; but the introduction of such testimony by the living party

will not make such party a competent witness in his own behalf. The former testimony of the deceased must be voluntarily read by his representative, in order to entitle the opposite party to testify in the case: *Levy v. Dwight*, 12 Col. 101; 20 Pac. Rep. 12, 15. In an action against the administrator of a decedent, it is competent for the plaintiff to testify concerning communications had by him with persons representing the decedent: *Guillaume v. Flannery* (S. D.), 108 N. W. Rep. 255, 256.

(2) **Parties not interested.** The obvious meaning of the provision in the California statute, that "parties to an action or proceeding against the estate shall not testify" is, that a party to the action shall not testify against the executor or administrator. It could not have been the intention of the legislature to render incompetent as a witness, in such cases, the executor or administrator, who is charged with the duty of protecting the estate against improper or unjust demands, as, in many cases, it would tie his hands, and operate to prevent his giving efficient protection, and compel him to stand by with lips sealed, and see the estate despoiled, when, if permitted to speak, the fraudulent or unjust character of the claim would be exposed and defeated. The manifest intent and purpose of the statute is, that it is only parties who assert "claims" against an estate who are rendered incompetent to testify, and the word "parties" does not refer to the executor or administrator, who is the party defendant: *Todd v. Martin* (Cal.), 37 Pac. Rep. 872, 874. The California statute providing that parties or persons in whose behalf an action is prosecuted against an executor or administrator, on a claim against a deceased person's estate, cannot be a witness to any fact occurring before the death of such person, neither disqualifies parties to a contract, nor persons in interest, but only parties to the action. It does not disqualify one who is neither a party nor a person in whose behalf the action is prosecuted, although he may have an interest in the outcome of the litigation: *Merriman v. Wickersham*, 141 Cal. 567, 572; 75 Pac. Rep. 180. A person who is sued, with other defendants, by the administrator of the estate of a decedent, as a defendant in the action, wherein it is alleged, by the plaintiff, that a person testifying had assigned to the deceased person his right, title, and interest in and to the claims and property in controversy, and where the witness comes into the action, and disclaims any interest therein, he is not disqualified to testify in the cause on behalf of the remaining defendants, he having, at the time, no interest in the controversy: *Murphy v. Colton*, 4 Okl. 181; 44 Pac. Rep. 208. Persons having no interest in the litigation, as parties thereto, or otherwise, are not rendered incompetent to testify when the other party to the transaction is dead. Were such a construction of the statute to prevail, the doors of the courts would practically be closed against all persons having any character of action arising upon

any transaction, when the other party to the transaction is dead: *Burgess v. Helm*, 24 Nev. 242; 51 Pac. Rep. 1025, 1026. It is only persons interested, as parties to the action, who are excluded by the statute: *Carr v. Jones*, 29 Wash. 78; 69 Pac. Rep. 646, 647. Under the statute of Arizona, which permits parties to be witnesses under all conditions and circumstances, with but few exceptions, and which does not, in terms, prohibit the husband or wife of a party to the action from testifying as to any conversation which he or she may have had with the deceased during his lifetime, a grantee's husband may, in an action by the grantee against the grantor's administrator, to have the deed corrected, testify as to statements made to him by the grantor concerning a mistake in the deed, and as to the land intended to be conveyed thereby: *Miller v. Miller*, 7 Ariz. 316; 64 Pac. Rep. 415, 416. Even an heir or distributee of an estate, who is not a party to the record, nor directly interested in the result of the action, although the result of a judgment against the defendant would be to decrease the amount of his estate, is not disqualified as a witness for the executor or administrator: *McCoy v. Ayres*, 2 Wash. Ter. 307; 5 Pac. Rep. 843.

(3) **Party may testify to what in general.** The Kansas statute does not prohibit a party to an action, pending between himself and the executor of the estate of a deceased person, from testifying as to any matter relevant to the issues therein, except as to transactions or communications had personally with the deceased: *Park v. Ensign*, 10 Kan. App. 173; 63 Pac. Rep. 280. Nor is he necessarily incompetent to testify as to transactions between the deceased and his codefendant in which he took no part: *Eddy v. O'Brien*, 9 Kan. App. 882; 57 Pac. Rep. 244, 245. A daughter, or other party prosecuting a claim against the estate of a deceased person, is competent to testify to conversations had between the deceased and a third person, in the presence and hearing of the witness: *Griffith v. Robertson*, 73 Kan. 666; 85 Pac. Rep. 748. A party to an action may testify in respect to transactions or communications had by him with a deceased person, where the adverse party is not the executor, administrator, heir at law, next of kin, surviving partner, or assignee of such deceased person, and where the title to the cause of action was not acquired immediately from him: *Reville v. Dubach*, 60 Kan. 572; 57 Pac. Rep. 522. Where one of the parties to an action is an heir of the deceased person, who claims that the title to the land in controversy was transferred to his ancestor by the adverse party, such adverse party may testify that he had no transactions personally with the deceased, and that no transfer of title was ever made by him to the deceased: *Murphy v. Hindman*, 58 Kan. 184; 48 Pac. Rep. 850. A party to an action is not prohibited from testifying in his own behalf to a personal transaction—in this case, payment—had with a deceased administrator, as against the successor of such deceased administrator, who sues to recover, as part of the

assets of the estate of the intestate, the claim which the party testifies he paid to the deceased administrator as administrator of the estate of such intestate: *St. John v. Lofland*, 5 N. D. 140; 64 N. W. Rep. 930. The statute of Washington provides that, "in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased person," etc., "a party in interest or to the record shall not be permitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, any such deceased or insane person," etc. This statute does not prohibit the beneficiary of a benefit certificate, suing for the benefit, from testifying as to transactions with the deceased insured, tending to prove the truth of written statements of the deceased to the insurer. The defendant, in such a case, is not defending the action as executor or administrator, or legal representative of the insured, or as deriving its title from the insured, but is defending upon the theory that the representations made by the insured were false, and that thereby a fraud was perpetrated upon the company. Such a case does not fall within the ban of the statute: *Erickson v. Modern Woodmen*, etc., 43 Wash. 242; 86 Pac. Rep. 584, 585. In an action, under such statute, against a widow, as administratrix of her deceased husband, on a note indorsed by him, the plaintiff may testify that defendant was not present at the time the notes in suit were indorsed, but he is incompetent to testify as to transactions had by him with the decedent, or as to statements made to him by decedent, and cannot testify as to whether the notes had been changed since he received them from the deceased, as this would be an indirect way of asking what their condition was when received from the hands of the deceased, and is a palpable attempt to evade the statute: *O'Connor v. Slatter* (Wash.), 93 Pac. Rep. 1078, 1079. The statutory rule prohibiting a claimant from testifying concerning transactions had by him with, or statements made to him by, a deceased person is not violated where the witness does not say anything at all about conversations and transactions between himself and the decedent, and he may properly testify as to his relations with property belonging to decedent, and for the handling of which he was to receive a specified compensation for his services: *Marvin v. Yates*, 26 Wash. 50; 66 Pac. Rep. 131, 132, 133. In a suit to recover a portion of a mining claim, brought by the grantor's administrator, on the ground that the deed under which defendant's claim is "so indefinite as to make the deed inoperative," and where the defendants are merely protecting themselves against the claims and demands of plaintiff, they are not seeking to enforce any "claim" or "demand" against the estate, and they are therefore competent witnesses to testify as to any matters of fact occurring before the death of the grantor: *Collins v. McKay* (Mont.), 92 Pac. Rep. 295, 297.

(4) **Party may testify to what in particular.** The Colorado statute provides, that "in any action, suit, or proceeding, by or against any

surviving partner or partners, joint contractor or contractors, no adverse party or person adversely interested in the event thereof shall be rendered a competent witness to testify to any admission or conversation by any deceased partner or joint contractor, unless some one or more of the surviving partners or joint contractors were also present at the time of such admission or conversation." This statute clearly indicates that, where the suit is brought against any surviving partner or joint contractor, the testimony relative to any admission or conversation by the deceased person or joint contractor shall not be admitted, unless some one or more of the surviving partners or joint contractors were present at the time of the admission or conversation. Hence, if one is defending an action in the double capacity of surviving partner and as trustee of the heirs at law, the testimony of the plaintiff as to a conversation had with a deceased partner, in the presence of a surviving partner, is admissible: *Savard v. Herbert*, 1 Col. App. 445; 29 Pac. Rep. 460, 462. The inhibition of the Colorado statute as to a person testifying in his own behalf, in a case where an adverse defendant is an heir of a deceased person, does not extend to books of account between a party to a proceeding and such deceased person. Hence in a suit for an accounting between heirs and devisees, where it appears that one of them loaned money for the decedent before his death, his account book showing the repayment of a loan is admissible in evidence on proper preliminary proof: *Haines v. Christie*, 28 Col. 502; 66 Pac. Rep. 883, 887. In an action against the administrator, on a claim against the estate, plaintiff's wife is a competent witness; but where a deposition taken by the administrator is introduced in evidence and read by the claimant, and there is attached to such deposition as an exhibit a letter written by the claimant to the deponent after the death of decedent, in which claimant set forth, in detail, the amount and character of the services rendered by him to the decedent, upon which services his claim against the estate was based, an objection to the introduction of such exhibit should be sustained. The claimant being disqualified as a witness, by virtue of the statute, no self-serving statement made by him in the form of a letter could be competent evidence: *Butler v. Phillips* (Col.), 88 Pac. Rep. 480, 484. In an action for an accounting between cotenants of the rents and profits of a quarry in which defendant holds title as devisee, it is competent for plaintiff to testify as to the existence of a partnership between himself and the deceased divisor, as well as to the terms of the partnership agreement: *Flynn v. Seale*, 2 Cal. App. 665; 84 Pac. Rep. 263. In an action to foreclose a deed given as security for debt, wherein the grantee, witness, and the heirs at law of the grantor, since deceased, are adverse parties, testimony of the grantee that he had paid interest on a prior mortgage, and taxes on the mortgaged premises, to protect the lien of his deed, does not come within the statute disqualifying a party to an action from testifying to transactions had with a person since deceased:

Omlie v. O'Toole (N. D.), 112 N. W. Rep. 677. In an action by an administrator of the estate of a deceased person, the defendants, if otherwise qualified, may testify as to the mental capacity of the deceased at the time the contract is claimed to have been made: *Grimshaw v. Kent*, 67 Kan. 463; 73 Pac. Rep. 92. In an action against an executor or administrator, on a note executed by his decedent, plaintiff's testimony that, of his own knowledge, decedent had made payments preventing the bar of limitations, is not inadmissible, where it does not appear affirmatively that the witnesses' knowledge had come to him through any transaction or communication had by him personally with the decedent: *Crebbin v. Jarvis*, 64 Kan. 858; 67 Pac. Rep. 531, 532. An attorney at law, who brings suit against an executor or administrator for professional services rendered to the deceased person, may testify as to incidental matters respecting his practice and income, especially where such matters cannot be said to have occurred before the death of deceased; and he is not precluded, by his incompetency as a witness, from reading to the jury, during his argument, the claim and verification thereof attached to the complaint and made a part thereof: *Knight v. Russ*, 77 Cal. 410, 414; 19 Pac. Rep. 698. The statute is not violated by questions asked of a witness which do not relate to anything that occurred before the death of the deceased. Hence he may testify as to payments made after the death of decedent: *Cowdrey v. McChesney*, 124 Cal. 363; 57 Pac. Rep. 221, 223. If a contractor, and the executors and heirs of the deceased owner of a building, erected under a contract between said contractor and the owner, are parties defendant in an action to foreclose a subcontractor's lien, the contractor's evidence as to when the building was completed, is not objectionable as referring to a "transaction" with a party since deceased: *First Nat. Bank v. Hilliboe* (N. D.), 114 N. W. Rep. 1085, 1086.

(5) **Employees, clerks, agents, etc.** The Kansas statute, which provides that "no party shall be allowed to testify in his own behalf in respect to any transaction or communication had personally by such party with a deceased person," does not apply to an agent of a party to the action, such agent not being a party to the action, nor having any legal interest in the result of it: *Carroll v. Chipman*, 8 Kan. App. 820; 57 Pac. Rep. 979. The California statute disqualifies only "parties or assignors of parties." It does not apply to persons who are merely employed by such parties or assignors of parties. Hence, in an action against an administrator, the books of account of a bank are admissible in evidence, in a proper case, and the officers of the bank are competent to make preliminary proof of such books: *City Sav. Bank v. Enos*, 135 Cal. 167, 172; 67 Pac. Rep. 52. The deposition of plaintiff's agent, in an action of replevin against a sheriff's executor, is competent and admissible to show title in plaintiff, where he has no

direct interest in the event of the action: *King Shoe Co. v. Chittenden*, 16 Col. App. 441; 66 Pac. Rep. 173, 174. The statute excludes only the testimony of a party to the action. It does not exclude the testimony of the agent of the party or person whose testimony is excluded. The agent of such party is a competent witness to prove the whole cause of action, or the defense, although the opposite party derived his interest in the subject-matter of the controversy, through a deceased party. Hence in an action to foreclose a subcontractor's lien, where a bank is plaintiff, and the executors and heirs at law of the deceased owner of the building, erected under a contract between the contractor and the owner, are made parties defendant, the cashier of the plaintiff bank is a competent witness to give testimony as to the mailing of a notice to the deceased, that the plaintiff had furnished to the contractor the materials for which a lien is claimed, even if it be conceded that the mailing of such a notice was "a transaction with the deceased," which is not decided: *First Nat. Bank v. Hilliboe* (N. D.), 114 N. W. Rep. 1085, 1086.

REFERENCES.

Effect of statute, relating to the competency of a party to testify in regard to transactions or communications with a deceased person, on the admissibility of his testimony as to transactions with the attorney or agent of such person: See note 7 L. R. A. (N. S.) 684-686.

(6) **Officers and stockholders of corporations.** The Kansas statute, which prohibits a party from testifying in his own behalf in respect to any transaction or communication had personally with a deceased person, etc., does not exclude the officers of a corporation which may be a party, or other interested persons not parties to the action: *Mendenhall v. School District* (Kan.), 90 Pac. Rep. 773. The California statute, which prohibits parties to an action against an executor or administrator, upon a claim or demand against the estate of a deceased person, from being a witness as to any matter of fact occurring before the death of such deceased person, does not disqualify all persons who are officers or stockholders of the corporation from testifying: *City Sav. Bank v. Enos*, 135 Cal. 167, 172; 67 Pac. Rep. 52. A stockholder and officer of a corporation may testify as to any fact occurring before the death of such person, in an action by the corporation, or its assignee, against an executor or administrator: *Merriman v. Wickersham*, 141 Cal. 567; 75 Pac. Rep. 180. So under a statute which precludes a party in interest, or to the record, from testifying as to any transaction had by him with, or any statement made to him by, a deceased person, when the adverse party sues or defends as executor or administrator, or as legal representative of such deceased person, stockholders or directors in a bank are not, in an action to recover the amount of a note given by another stockholder, parties in interest, if they have no interest in the controversy. They are therefore compe-

tent witnesses to explain the terms of a note in writing, as to the intention of the parties when it was made, where the language is such as to render its meaning doubtful, and resort must be had to other testimony in order to ascertain the meaning and intent of the parties by the language used: *Carr v. Jones*, 29 Wash. 78; 69 Pac. Rep. 646. The cashier of a national bank, which is a party to an action, is a competent witness to testify to the fact of the mailing of a notice to a deceased person, whose executors and heirs at law are parties to the action, where the statute prohibits the evidence of parties only in such cases: *First Nat. Bank v. Hilliboe* (N. D.), 114 N. W. Rep. 1085, 1086.

(7) **Widow of deceased.** In an action by a widow against the administrator of her deceased husband's estate, to establish a conveyance of certain land from her husband to her, and to quiet the title, the plaintiff is a competent witness as to a matter of fact occurring before the death of the decedent: *Poulson v. Stanley*, 122 Cal. 655; 55 Pac. Rep. 605, 606. And in an action against the administrator on a note, the wife of the deceased maker of the note is competent to testify as to the payment, before decedent's death, of a sum indorsed on such note as paid. She is not an adverse party, in any sense, nor can it be said that she is disqualified by reason of interest, assuming that interest works a disqualification: *Stewart v. Dudd*, 7 Mont. 573; 19 Pac. Rep. 221, 224. The statute of Washington does not prohibit a witness who is an interested party from testifying in favor of the estate of a deceased person. Hence in an action against a widow, as administrator of her deceased husband's estate, on a note indorsed by him, she is a competent witness to testify as to what took place between her deceased husband and plaintiff, in her presence, at the time such indorsement was made: *O'Connor v. Slatter* (Wash.), 89 Pac. Rep. 885, 886. A widow is a competent witness as to transactions with her deceased husband, where she is not a party to the action, and cannot be bound by any judgment therein: *Sackman v. Thomas*, 24 Wash. 660; 64 Pac. Rep. 819, 827.

(8) **Competency in other particular instances.** The testimony of the maker of a note, not made a party to the suit thereon, that he was the principal, and the defendant a surety, and that the deceased payee had, for a valuable consideration, and without the knowledge of the surety, extended the time of the payment thereof, is not within the prohibition of the statute forbidding a party to testify, in his own behalf, in respect to transactions personally had with a deceased person: *Coger v. Armstrong*, 72 Kan. 691; 83 Pac. Rep. 1029. So where the defendant, in an action in ejectment, claims through an executor's sale of a deceased person's real estate, he is not the assignee of such deceased person, within the statute, and the plaintiffs, although they claim title immediately from such deceased person, are

not incompetent, under the provisions of the statute, to testify to transactions or conversations had with the deceased concerning the subject-matter of the action: *Powers v. Scharling*, 71 Kan. 716; 81 Pac. Rep. 479. The plaintiff is not precluded from testifying, as a witness on his own behalf, where the action is not one prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person: *Cunningham v. Stoner*, 10 Ida. 549; 79 Pac. Rep. 228. In a suit by the divorced wife of a grantor, claiming the property conveyed in her own right, a grantee of the deceased grantor is competent to testify to conversations with the latter. In such a case, the adverse party, the plaintiff, is not suing as "executor, administrator, heir, legatee, or devisee of the deceased," nor as "guardian, assignee, or grantee, directly or remotely, of such heir, legatee, or devisee": *Murphy v. Ganey*, 23 Utah, 633; 66 Pac. Rep. 190, 193. A husband is a competent witness in an action by him, against the administrator of his deceased wife, to quiet the title to the land which was community property. The controversy, in such a case, is not one concerning a "claim" or "demand" against the estate of the deceased. It is concerning the property of the plaintiff, and to quiet a claim, or demand, or title asserted by the estate to such property. The question to be determined is as to whether or not the interest held by deceased, under the deed, is the property of the estate, or the property of plaintiff. If it is not the property of the estate, then the action does not involve a claim or demand against the estate: *Bollinger v. Wright*, 143 Cal. 292; 76 Pac. Rep. 1108, 1110. In a street-car accident, in which both husband and wife were injured, and where the husband, within a few months afterwards, died, and where the motorman of the street car which struck the plaintiff was not made a party in an action by the plaintiff to recover for personal injuries, and, as executrix of her husband's estate, for injuries sustained to the community by reason of such accident, he may testify as to conversations had with the husband before his death. In such a case, he is not a "party in interest, or to the record" who is admitted "to testify in his own behalf" within the meaning of the statute. He is in no sense a party, and cannot be bound by the result of the suit: *O'Toole v. Faulkner*, 34 Wash. 371; 75 Pac. Rep. 975, 977. In an action on a note, by an indorsee of a firm, against a co-payee and indorser of the note, upon the latter's liability as an indorser, and where one of the members of the firm, who was also a payee and indorser of the note, is dead, the defendant is a competent witness to testify to facts which occurred before decedent's death: *McPherson v. Weston*, 85 Cal. 90, 97; 24 Pac. Rep. 733. In an action to foreclose a subcontractor's lien, where the executors and heirs at law of the deceased owner of the building, erected under a contract between the contractor and the owner, are made parties defendant, the contractor may testify as to when the building was completed, without violating the rule which prohibits a

party from testifying as to transactions with a party since deceased; but he is not a competent witness as to payments made on the contract: *First Nat. Bank v. Hilliboe* (N. D.), 114 N. W. Rep. 1085, 1087.

4. Who are incompetent.

(1) **In general.** To render a witness incompetent, under the California statute, it must not only appear that the witness is a party to the action, and that the action is against the executor or administrator of a decedent, but it must also appear that the action is upon a claim or demand against the estate of the decedent, and that the testimony sought from the witness is as to a matter of fact occurring before the death of the decedent. Unless all of the conditions exist, the witness cannot be held incompetent: *Poulson v. Stanley*, 122 Cal. 655, 658; 68 Am. St. Rep. 73; 55 Pac. Rep. 605; a case showing the changes made in the California law. In a joint action, for the value of services rendered by the plaintiff, and by his assignor, upon a demand against the representatives of a decedent and a co-defendant, the plaintiff's assignor, though not a competent witness, against such representatives, to prove his employment by the decedent, is competent to testify against the co-defendant, against whom a several judgment might be rendered: *Shain v. Forbes*, 82 Cal. 577, 583; 23 Pac. Rep. 198. An estoppel cannot be proved in violation of the statute relative to transactions with deceased persons: *Frazier v. Murphy*, 133 Cal. 91, 97, 98; 65 Pac. Rep. 326. In an action by an administrator, one who has, by service of summons by publication, been made a party to the action, cannot testify in favor of his co-defendant as to any transaction between himself and the deceased, although he did not appear in the action, and filed no answer therein: *Bunker v. Taylor*, 13 S. D. 433; 83 N. W. Rep. 555, 558, 559. The contractor of a building, pursuant to a contract with the owner of the building, is not a competent witness as to payments made on said contract, where the owner of the building has since died, and his executors and heirs at law are made parties defendant with said contractor, in an action by the plaintiff to foreclose his lien as a subcontractor: *First Nat. Bank v. Hilliboe* (N. D.), 114 N. W. Rep. 1085, 1087. Under the statute of Wyoming, the petitioner, in a proceeding against heirs of a deceased person to establish the heirship of petitioner as widow of the deceased, is incompetent to prove her marriage. If no objection is made to her testimony, the evidence, in the absence of such objection, is competent, although the witness is not. But as the statute makes her an incompetent witness, that fact should be considered in determining the weight to be given to her testimony: *Weidenhoft v. Primm* (Wyo.), 94 Pac. Rep. 453, 458.

(2) **Parties cannot testify to what in general.** Where the party on one side of a controversy is the executor, administrator, heir at law, or next of kin of the deceased person, and has acquired title to the

cause of action directly through said deceased person, the adverse party is incompetent to testify to any transaction or communication had with such deceased person: *Roach v. Roach*, 69 Kan. 522; 77 Pac. Rep. 108. Where the adverse party is defending as deriving title through a decedent, the plaintiff is not a competent witness to testify, in his own behalf, to any transaction between himself and the decedent: *Preston v. Hill-Wilson Shingle Co.* (Wash.), 97 Pac. Rep. 293, 294. Under the statute of Washington, which provides that a party in interest, or to the record, shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by, a deceased person, in an action against a party deriving title through such deceased person, the plaintiff, in an action to recover certain land, where defendant's claim as representatives of the plaintiff's deceased father, and who derived title to the land through the executor of the father's will, is not a competent witness to explain the conditions of the bond for title, and other writings, between himself and his father: *Reynolds v. Reynolds*, 42 Wash. 107; 84 Pac. Rep. 579, 581. So where the statute provides that, in an action where a party sues as deriving title from a deceased person, the adverse party shall not be permitted to testify as to any transaction had with the decedent, a self-serving affidavit filed in the county auditor's office, stating in substance, that the real estate left by decedent had been purchased with partnership funds, and that it was the joint property of affiant and decedent, is not admissible as evidence in favor of the affiant, in a suit brought by a claimant under the decedent's will, to remove the cloud on title caused by such affidavit: *Samuel etc. Kenney Presb. Home v. Kenney*, 45 Wash. 106; 88 Pac. Rep. 108, 109, 110. In ejectment, the plaintiff's testimony that he had purchased the land from defendant's decedent, and detailing other particulars of the transaction, must be excluded, although the evidence detailing the transaction with the deceased was first brought out in cross-examination: *Kline v. Stein*, 30 Wash. 189; 70 Pac. Rep. 235, 236. Where the plaintiff claims by, through, or from a deceased person, the declarations of said deceased person to either party to the record, in a controversy over the title to land, cannot be testified to by either of them: *Smith v. Taylor*, 2 Wash. 422; 27 Pac. Rep. 812, 813; showing change of the statute. Under the statute of Utah, a party to an action to establish his interest in the estate of a deceased person cannot testify, in his own behalf, to any conversation or transaction equally within his own knowledge and the knowledge of the person since deceased, when the opposite party sues or defends as the heir of such deceased person: *Hennefer v. Hays*, 14 Utah, 324; 47 Pac. Rep. 90. As the plaintiff, under the California statute, is incompetent to testify against an administrator upon a claim or demand against the estate of a deceased person as to any fact occurring prior to the death of such person, he is also incompetent to contradict the evidence of a witness as to admis-

sions made by such witness prior to decedent's death, and which tend to prove, or to disprove, the facts in issue: *Stuart v. Lord*, 138 Cal. 672, 676, 678; 72 Pac. Rep. 142. A party to an action is prohibited from testifying to a conversation with plaintiff's intestate, notwithstanding the fact that an agent of the decedent was present at the time the conversation took place: *Hutchinson v. Cleary*, 3 N. D. 270; 55 N. W. Rep. 729.

(3) **Parties cannot testify to what in particular.** Where all the parties claim title to certain real estate directly from a person named, as heirs, evidence of the defendants as to communications had personally with such person is inadmissible, under the statute: *Renz v. Drury*, 57 Kan. 84; 45 Pac. Rep. 71. A father gave each of two sons a tract of land. On one tract was a mortgage, and it was claimed that, in order to equalize the gifts, an agreement had been entered into whereby each son should pay one half of this mortgage debt. Before the debt was paid the son, whose land was free from encumbrance, died, and the other son brought an action against the administrator of the estate of the deceased son to recover one half of the mortgage debt. The mother, who had joined the father in the conveyance of the land to the sons, became a witness, and testified as to the agreement with reference to the mortgage debt. It was held that such witness was not to be regarded as an "assignor" of the thing in action, and that she was not precluded from giving such testimony by any of the prohibitions of the statute: *Miller v. McDowell*, 63 Kan. 75; 64 Pac. Rep. 980. In an action brought to foreclose a mortgage, and to render judgment on the notes thereby secured, it appeared that the notes and mortgage sued on had been procured of the defendant by the plaintiff upon the representation that they were needed to tide him over a temporary financial embarrassment, and an agreement on his part to cancel and return them to the maker as soon as they had served that temporary purpose. It was held that, as between the parties to such transaction, the notes and mortgage could not form a basis for the recovery of a judgment in such action: *Long v. Steele*, 10 Kan. App. 160; 63 Pac. Rep. 280. Under the statute of Oklahoma, in an action brought to recover a city lot, claimed to have been leased by plaintiff, and for which the lessee obtained a deed, without notice to the plaintiff, from the board of town-site trustees, while he occupied the lot as a tenant of the plaintiff, and where the lessee died before trial, the plaintiff is not a competent witness to testify that he had made the lease to the lessee, as such testimony constitutes a very important and material part of the evidence produced in behalf of the plaintiff, and is within the inhibition of the statute as to personal transactions or communications had with the deceased: *Cunningham v. Phillips*, 4 Okl. 169; 44 Pac. Rep. 221, 222. In an action on a note, by the legal representatives of the deceased payee, it is proper to exclude the testi-

mony of the defendant, who seeks to prove when and where the note was given, and who was present when the transaction with the testator took place, pursuant to which the note was afterwards given, in order to lay a foundation for the testimony of a third person, by whom he expects to prove what the bargain was. Testimony by the defendant, in such action, to the effect that the note in suit was the only note he ever gave to the deceased, and that he never had any other transaction with the deceased, is likewise prohibited: *Regan v. Jones* (N. D.), 105 N. W. Rep. 613. The Colorado statute, fixing the status of ripened counterclaims in cases of assignment or death, and providing that the happening of either of these events shall not affect the right to plead and to rely upon the set-off in case of suit, does not affect the statute which prohibits a party from testifying in his own behalf when the adverse party sues or defends as executor or administrator of any deceased person. And in an action by an administrator, it has been held proper to reject defendant's testimony as to a counterclaim set up by him, against plaintiff's intestate, which counterclaim was due prior to the death of decedent: *Rathvon v. White*, 16 Col. 41; 26 Pac. Rep. 323, 324. The fact that a witness is a proper party to an action in which the executor, administrator, or heirs at law of a deceased person are parties, disqualifies such witness from testifying to transactions with, or statements made by, such deceased person. The fact that such witness is a party defendant with the administrator, executor, or heirs does not render him competent as a witness in such cases: *Cardiff v. Marquis* (N. D.), 114 N. W. Rep. 1088, 1089; *Marquis v. Morris* (N. D.), 114 N. W. Rep. 1091. The evidence of a witness, who is a party to an action in which the administrator of a deceased person is also a party, is not admissible to prove the contents of lost letters, which passed between the witness and such person before the latter's death: *Cardiff v. Marquis* (N. D.), 114 N. W. Rep. 1088, 1090; *Marquis v. Morris* (N. D.), 114 N. W. Rep. 1091.

(4) **Partnership affairs in general.** Where a suit was brought against two co-contractors, but one of them died after suit brought, and the action was revived against his administrator, and the other party defendant made default, but the administrator of the deceased party answered, denying the obligation, the surviving obligor, against whom judgment by default was rendered, is not a competent witness for the plaintiff, against his codefendant and joint obligor, as to facts which occurred prior to the death of the deceased obligor: *Moore v. Schofield*, 96 Cal. 486, 487; 31 Pac. Rep. 532. In an action for an accounting between alleged partners, and where the statute disqualifies persons in interest from testifying concerning transactions with insane persons, it is proper to exclude a question asked of the plaintiff as to who composed the partnership, where one of the defendants, alleged to be a partner, is insane. The decedent, who is defending as the

guardian of an insane person, is not competent to testify, in her own behalf, as to any transaction had with her codefendant, who is insane: *Chlopeck v. Chlopeck* (Wash.), 91 Pac. Rep. 966. In proceedings for the administration of an estate, where the administratrix is claiming one half of the property, standing in the name of the decedent, she should not be allowed to testify, over the objection of the heirs, to a partnership agreement between the decedent and the heirs: *In re Alfstad's Estate*, 27 Wash. 175; 67 Pac. Rep. 593, 597.

(5) **Action by or against surviving partner.** If a surviving partner brings an action to recover alleged partnership property, his testimony authenticating the books of account, but which are not claimed in the record to be partnership books, and which contain transactions of his individual business, as well as of the alleged copartnership business, are not admissible evidence, because they relate to transactions with a deceased person: *Schwartz v. Stock*, 26 Nev. 128; 65 Pac. Rep. 351, 353, 354, 355. So in a suit by a surviving partner to foreclose a mortgage, the defendant cannot testify that the deceased partner accepted property under a verbal agreement, in satisfaction of the mortgage, as this would come within the inhibition of the statute, which prohibits testimony relative to transactions between parties, one of whom has since died, and whose representative is engaged in a suit with the survivor: *Gage v. Phillips*, 21 Nev. 150; 26 Pac. Rep. 660, 662; showing change of the statute. The admissions of a surviving partner are, in a suit against him and the estate of his deceased copartner, not competent to show that the debt sued on was a firm debt, particularly in the face of evidence showing that the survivor, prior to the death of his copartner, had assumed the debt as his individual liability, and had given his individual note and security for the supposed extinguishment of any partnership liability: *Cooper v. Wood*, 1 Col. App. 101; 27 Pac. Rep. 884, 886. So in an action by an administrator against a partnership, a partner, who seeks to set off an individual claim against the partnership indebtedness, is not competent to testify that it was agreed with the firm and the deceased that the debt due deceased was to be applied on the indebtedness of deceased to the witness: *Rogers v. McMillen*, 6 Col. App. 14; 39 Pac. Rep. 891, 892. Where a partnership existed between two persons, and a settlement was had upon the dissolution thereof, but one of the partners afterwards died, and his administratrix brought suit against the survivor to recover an overpayment made by mistake to the defendant, it is objectionable to ask defendant as to "what transpired at the time of the settlement and all you remember about it," as this question is general, and calls for everything that transpired at that time, including private statements of the deceased: *Moylan v. Moylan* (Wash.), 95 Pac. Rep. 271, 272. In an action by or against a surviving partner, the opposing party is not, as a rule, competent to testify to transactions or conversations

with the deceased partner. But the opposing party may testify, where the surviving partner was present, and was cognizant of the whole transaction, and where the transaction or conversation proposed to be proved was had with the surviving partner, though before the death of his copartner: *Bay View Brewing Co. v. Grubb*, 31 Wash. 34; 71 Pac. Rep. 553, 556.

(6) **Action on note indorsed to partnership.** The defendant, in an action on a note executed to him and by him indorsed to a partnership, which in turn transferred it to the plaintiff, and where, at the time action was begun, two of the partners were dead, is not competent to testify that the words "demand and notice waived" were not on the note when he indorsed it, if the statute provides that, where a party sues as deriving title through a decedent, a party in interest may not testify in his own interest as to a transaction by him with decedent. If he were heard to say that such words were not on the note when he indorsed it, he may be heard to say that the note itself has been changed, or that it is not the note he intended to indorse, or he may be heard to contradict or vary the note in any other particular. If the condition of waiver were not upon the note when it was indorsed and delivered, but was subsequently placed there without the consent of the defendant, then the act of placing the condition over the signature of the defendant is not a transaction by the defendant with the deceased person. But when it is admitted that it was a "transaction," then a party in interest, or to the record, the other being dead, cannot be heard to detail what that transaction was, or to say that there was no transaction. In other words, when defendant admits that there was a "transaction," he cannot be heard to say that there was no transaction for the purpose of showing what the real transaction was. If the fact that the note or indorsement has been materially changed since he signed and delivered it, that fact must be proved by some other evidence, than evidence by the mouth of the defendant, as to the condition of the note at the time it was indorsed: *Bay View Brewing Co. v. Grubb*, 31 Wash. 34; 71 Pac. Rep. 553, 555.

(7) **Physician's services to deceased.** A physician who has performed professional services for a deceased person cannot testify, as to any matter of fact which occurred before the death of the deceased, in his own favor, or in favor of an assignee: *McGlew v. McDade*, 146 Cal. 553; 80 Pac. Rep. 695; and it is error, in an action against an administrator by a physician for services rendered the defendant's decedent, to permit the physician's wife to testify to statements made by the deceased as to such services, where the statute declares that, in an action where the adverse party sues or defends an administrator, a party in interest, or to the record, shall not be permitted to testify in his own behalf to statements made by the decedent. The compensa-

tion for such services belongs to the community, and the wife is interested equally therein with her husband: *Whitney v. Priest*, 26 Wash. 48; 66 Pac. Rep. 108. In a proceeding to establish a claim for medical services against a decedent's estate, a physician is not qualified to testify against the administrator's objection, on any matter, or at all, under the statute in Colorado: *Temple v. Magruder*, 36 Col. 390; 85 Pac. Rep. 832.

REFERENCES.

Competency of plaintiff, as witness, in an action by physician against a decedent's estate, for services rendered to the deceased: See note 8 Am. & Eng. Ann. Cas. 147.

(8) **Fraud.** Under the statute of Oklahoma, no party shall be allowed to testify, in his own behalf, to any transaction or communication had personally, by such party, with a deceased person, when the adverse party is the assignee of such deceased person, where he has acquired title to the cause of action immediately from such person; but the statute does not prohibit the proof of transactions and communications, had personally between a party to the suit and the deceased grantee of such person, by disinterested witnesses, or other competent evidence, besides that of a party to the suit. In an action by the grantor, to set aside a deed conveying lands, against a person who has acquired title to the land in controversy immediately from the deceased grantee of such grantor, the grantor is not allowed to testify, in his own behalf, to any transactions or communications had by him individually with his grantee, who is deceased, whether such transactions or communications are oral or in writing: *Conklin v. Yates*, 16 Okl. 266; 83 Pac. Rep. 910, 913, 915. Facts which constitute fraud on the part of a deceased person necessarily include personal transactions or conversations with such deceased person: *Conklin v. Yates*, 16 Okl. 266; 83 Pac. Rep. 910, 912.

(9) **Gifts.** If the subject-matter of litigation is the validity of a gift to a woman, since deceased, the husband and heir of the deceased is not, in an action between her administrator and one claiming the property as a gift *causa mortis* from her, a competent witness on behalf of the administrator as to matters occurring before the wife's death: *Conner v. Root*, 11 Col. 183; 17 Pac. Rep. 773, 777; neither is one who seeks to establish a *parol gift causa mortis* a competent witness to prove the gift as against the executor of the deceased donor: *Hecht v. Shaffer*, 15 Wyo. 34; 85 Pac. Rep. 1056, 1057.

(10) **Promissory notes.** If the original payee of a note brings an action thereon against the administratrix of the maker, he is incompetent to testify that he saw the maker sign it, when the execution of the same was a part of the trade between the maker and himself; but

when the execution of the note is established fully by other and competent evidence, the error in permitting the plaintiff to testify is not reversible: *Bryant v. Starbrook*, 40 Kan. 356; 19 Pac. Rep. 917. If the plaintiff in an action on a note against two defendants has died, and an administrator has been substituted, one of the defendants is not a competent witness to testify for his codefendant, though such codefendant is not within the jurisdiction of the court, and has not been served with process, where the statute provides that no party to a suit, or person directly interested therein, shall testify, when the adverse party sues as administrator: *Williams v. Carr*, 4 Col. App. 363; 36 Pac. Rep. 644, 645. And the maker of a note, in an action by an executor thereon, is incompetent to testify as to transactions over which the note arose: *Jones v. Henshall*, 3 Col. App. 448; 34 Pac. Rep. 254, 255. So a party, sued by an administrator on notes which purport to have been executed in the state wherein suit is brought, will not be permitted to testify that they were executed in another state, where such evidence is not within any of the exceptions of the statute providing that a party shall not testify against an administrator who is the adverse party, except in specified cases: *Bliler v. Boswell*, 9 Wyo. 57; 59 Pac. Rep. 798, 801. And where it is admitted by the defendant that he indorsed a note, executed to a person since deceased, the act of indorsement was as much a "transaction" with the deceased as the signing of the note could be; and where the maker of a note is sued, and the executor or administrator of the payee sues as deriving a right by or through a deceased person, where the signature is confessed, the maker cannot be heard to testify, after the death of the payee, that the note had been altered or changed after execution and delivery without his consent; and the same rule applies to the indorsement. In an action by the administrator on the note, the defendant will not be permitted to vary the indorsement by his testimony: *Bay View Brewing Co. v. Grubb*, 31 Wash. 34; 71 Pac. Rep. 553, 555.

(11) **Establishment or enforcement of trusts.** In an action wherein it is sought to base a trust on an agreement with the deceased, the plaintiff is incompetent to testify to his agreement with deceased: *Fetta v. Vandevier*, 3 Col. App. 419; 34 Pac. Rep. 168, 169; *Vandevier v. Fetta*, 20 Col. 368; 38 Pac. Rep. 466. In a suit against executors to enforce a trust against the decedent's estate, plaintiff's testimony is properly excluded: *Wood v. Fox* (Utah), 32 Pac. Rep. 48, 53; (approved in *Whitney v. Fox*, 166 U. S. 637; 17 Sup. Ct. Rep. 713; 41 L. ed. 1145); *Delmoe v. Long*, 35 Mont. 139; 88 Pac. Rep. 778; *Rice v. Rigley*, 7 Ida. 115; 61 Pac. Rep. 290. But in California, it is held that the plaintiff is a competent witness to establish and to enforce a trust against the personal representative, even though it incidentally tends to establish a contract between the plaintiff and the deceased during his lifetime: *Myers v. Reinstein*, 67 Cal. 89; 7 Pac. Rep. 192;

Tyler v. Mayre, 95 Cal. 160, 170; 27 Pac. Rep. 160; 30 Pac. Rep. 196. The statute of Montana was doubtless adopted from the code of California, but the court in *Delmoe v. Long*, 35 Mont. 139; 88 Pac. Rep. 778, 782, declined to follow the construction given to it by the courts of California on the ground that such construction does not seem to be "reasonable"; and, in *Rice v. Rigley*, 7 Ida. 115; 61 Pac. Rep. 290; overruling *Nasholds v. McDonell*, 6 Ida. 377; 55 Pac. Rep. 894, repudiated the construction of the California court, as giving too narrow a meaning to the terms "claim" and "demand." So in Colorado, a person claiming to be a widow, who sues a trustee and an heir, to establish a trust and to obtain an interest in property, is prohibited from giving testimony material to the subject-matter of the inquiry, where the statute provides that no party shall testify, of his own motion, if the adverse party defends as heir: *Carpenter v. Ware*, 4 Col. App. 458; 36 Pac. Rep. 298, 299. Under such a statute where the plaintiff is seeking to establish a trust in land, standing in the name of defendant's deceased father, the plaintiff is incompetent to testify to his agreement with the decedent, on which he seeks to base the trust, notwithstanding the failure of a guardian ad litem for a minor defendant, and the court below, to protect the minor's right by objecting to, or excluding, testimony so manifestly incompetent: *Vandevier v. Fetta*, 20 Col. 368; 38 Pac. Rep. 466; *Fetta v. Vandevier*, 3 Col. App. 419; 34 Pac. Rep. 168.

(12) **Contest of will, or of its probate.** In an action brought by the heirs at law against the devisees and executrix to contest a will, the heirs are not competent witnesses to testify, in their own behalf, concerning communications had personally with the deceased testator: *Wehe v. Mood*, 68 Kan. 373; 75 Pac. Rep. 476. In proceedings to contest the probate of a will, where the question at issue was whether a certain will was executed subsequent to the one offered for probate, and where the proponent, who was the husband of the testatrix, offered to testify as to transactions, concerning the earlier will, between the witness and the deceased, in her lifetime, and which transactions were such as could not be contradicted by any person except the deceased, such testimony was properly excluded on the ground that the witness was a party to the action, and that his testimony was prohibited by the statute: *Starkweather v. Bell*, 12 S. D. 146; 80 N. W. Rep. 183, 185, 186. In the case of *In re Atwood's Estate*, 14 Utah, 1; 45 Pac. Rep. 1036; 60 Am. St. Rep. 878, devisees were held, in a will contest, not to be competent witnesses against a child omitted from the will; but this case was overruled by *In re Miller's Estate*, 31 Utah, 415; 88 Pac. Rep. 338, 345, so far as the former conflicted with the latter. In the latter case, which was one brought to revoke a will, alleged to have been executed under undue influence, and where the controversy was between living parties, who, on the one side, were the

devisees or legatees under the will, and on the other, the heirs at law of the testator, it was held that all of the parties interested were competent to testify to any fact which was relevant and material to the issue involved: *In re Miller's Estate*, 31 Utah, 415; 88 Pac. Rep. 338, 345. But, while the weight of authority is, perhaps, in favor of the contention that the probating of a will is a proceeding in rem and ex parte, and in which the heirs and devisees are competent to testify, notwithstanding the inhibition of the statute as to parties in interest, the rule in Colorado is that the provisions of the statute render them incompetent to testify. Such is the Illinois rule from which the Colorado statute was adopted. No distinction is there made between actions to contest a will after probate, and proceedings to contest the probate of a will. The purpose of the proceeding is the same, in each instance, to wit,—to divest the legatees and devisees of all right in the estate of the testator, and to vest the property in his heirs at law: *In re Shapter's Estate*, 35 Col. 578; 85 Pac. Rep. 688, 691. The executor of a will is a party to a will contest, and is not a competent witness; and one who is not a beneficiary under the will but is a party to the proceeding is not competent to testify in a contest thereof: *In re Shapter's Estate*, 35 Col. 578; 85 Pac. Rep. 688, 691. In an action brought to revoke a will, the heir of the testator is not competent to testify as to matters of fact which must have been equally within the knowledge of the testator, or as to any transactions with or statements made by him: *In re Miller's Estate*, 31 Utah, 415; 88 Pac. Rep. 338, 345.

(13) **Incompetency in other particular instances.** Under the statute of Idaho, which prohibits parties or assignors of parties to any action or proceeding prosecuted against an executor or an administrator, upon a claim or demand against the estate of a deceased person, from being witnesses as to any matter of fact occurring before the death of such deceased person, evidence of conversations with the deceased relative to a trust agreement or other disposition of his property is inadmissible: *Coats v. Harris*, 9 Ida. 458; 75 Pac. Rep. 243, 246. So in an action on a contract for services alleged to have been rendered by the plaintiff, a married woman, to the deceased, in his lifetime, as nurse and attendant upon him, the plaintiff's testimony relating to matters of fact which must have taken place in the lifetime of the deceased employer, concerning the course of conduct of herself and husband with respect to her earnings, is properly excluded as inadmissible: *Kaltschmidt v. Webber*, 145 Cal. 596, 597, 598; 79 Pac. Rep. 272. So in an action for damages for breach of a contract, a witness who has acknowledged, in writing, that he was jointly interested with plaintiff in the contract, for the breach of which damages are sought in such action, is incompetent to testify to facts which occurred before decedent's death: *Uhlhorn v. Goodman*, 84 Cal. 185, 192; 23 Pac. Rep. 1114.

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